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No.

In the Supreme Court of the United States

MICHAEL HARTMAN, ET AL., PETITIONERS

v.

WILLIAM G. MOORE, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether law enforcement agents may be liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for retaliatory prosecution in violation of the First Amendment when the prosecution was supported by probable cause.

2. Whether, if so, the law to that effect was clearly established at the time that criminal charges were filed against respondent, such that petitioners are not entitled to qualified immunity.

PARTIES TO THE PROCEEDING

Petitioners are Michael Hartman, Frank Kormann, Pierce McIntosh, Norman Robbins, and Robert Edwards. Respondent is William G. Moore, Jr.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the federal-officer petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 388 F.3d 871. The order of the district court denying petitioners' motion for summary judgment (Pet. App. 42a) is unreported. The order of the district court denying reconsideration (Pet. App. 32a-41a) is reported at 332 F. Supp. 2d 252. Prior opinions of the court of appeals (Pet. App. 43a-58a, 112a-128a) are reported at 213 F.3d 705 and 65 F.3d 189. The prior opinion of the district court dated September 24, 1993 (Pet. App. 129a-149a) is not published in the *Federal*

Supplement but is available at 1993 WL 405785. The other prior district court orders and opinions (Pet. App. 59a-111a, 150a-151a, 152a-165a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2004. A petition for rehearing was denied on January 31, 2005 (Pet. App. 166a). On April 22, 2005, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT

1. An investigation of public corruption in the procurement of equipment by the United States Postal Service (Postal Service) resulted in the successful prosecution of a member of the Postal Service's Board of Governors and a number of consultants. Respondent, the president of a company that hired the consultants on the recommendation of the corrupt member of the Board of Governors, was indicted but then acquitted. In this *Bivens* action, see *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), respondent alleges that United States Postal Inspectors targeted him in retaliation for his criticism of the Postal Service and for his lobbying activities.

a. In the mid-1980s, respondent was president and chief executive officer of Recognition Equipment, Inc. (REI), which was engaged in an effort to market "multi-line" optical character readers (OCRs) to the

Postal Service. OCRs, which can interpret text on an envelope, are used to sort mail. The total value of the contracts sought by REI was between $250 and $400 million. After the Postal Service decided to purchase "single-line" OCRs instead, respondent and REI mounted a media and lobbying campaign that sought to overturn the Postal Service's decision. Pet. App. 2a-4a; C.A. App. 259.

During the course of that campaign, Robert Reedy, REI's Vice President for Marketing, met with Peter E. Voss, a member of the Board of Governors of the Postal Service. Voss recommended that REI hire John Gnau and his consulting firm, Gnau and Associates, Inc. (GAI), to assist in REI's efforts to obtain a Postal Service contract. Voss later called respondent and said that he hoped Reedy would act on his recommendation. Respondent thereafter told Reedy not to "drop the ball" with respect to the referral. In January 1985, REI hired GAI as a consultant. C.A. App. 147-149, 269-270.

As it turned out, Voss had a substantial financial interest in ensuring that Gnau got consulting work, because the two had agreed that Voss would refer clients to Gnau's firm in exchange for a kickback of a portion of GAI's fees. They had also agreed that Voss, Gnau, and two other GAI officers—William Spartin and Michael Marcus—would split the contingency fee that REI was obligated to pay GAI if it received the Postal Service contract. Pet. App. 4a, 44a, 113a.

United States Postal Inspectors ultimately discovered this scheme, as well as a related one involving the search for a new Postmaster General in 1985. Spartin, the nominal president of GAI, also headed an executive recruiting firm called MSL International. Through Voss, and despite GAI's representation of REI before the Postal Service, Spartin's firm received

the contract to find a new Postmaster General. Spartin thereafter called respondent and asked for recommendations. Respondent gave Spartin the names of three prominent business executives, including Albert V. Casey, who was ultimately selected as Postmaster General. Respondent also made an introductory call to Casey on Spartin's behalf. C.A. App. 152-153, 274.

The postal inspectors' investigation resulted in federal criminal charges against Voss, Gnau, and Marcus, all of whom pleaded guilty. Spartin was given immunity in exchange for his cooperation. Pet. App. 4a.

b. As the investigation continued, the postal inspectors determined that respondent and Reedy must have known about the criminal schemes from which they stood to benefit. Although neither Voss nor any of the GAI defendants implicated them, Pet. App. 25a, there was considerable circumstantial evidence that respondent and Reedy had been aware of the illegal agreement between Voss and Gnau and had used it to their company's advantage. For example:

- The postal inspectors discovered that Reedy, the REI vice president, had lied to them about prior contacts with Voss. When asked who had recommended GAI to him, Reedy said that he had gotten Gnau's name from a consultant during a chance encounter at the 1984 Republican National Convention. Reedy later admitted that he had received the referral from Voss. C.A. App. 270.

- GAI's Michael Marcus recounted a conversation in which Spartin indicated that REI had purged records relating to the investigation, and there were in fact a number of omissions in the records that REI produced in response to a

subpoena. Respondent's "Postal" notebook appeared to be missing 36 sheets of paper, and there were no entries for a six-month period in 1986. In addition, respondent's telephone log for a three-month period in 1984-1985 was never located. C.A. App. 155, 271, 274.

- One of respondent's notebooks included an entry suggesting that he might have coached REI employees on how to answer questions from postal inspectors,[1] and REI employees subsequently testified before the grand jury that respondent had made comments consistent with that entry at a staff meeting the same day. By that time, postal inspectors had arranged to interview REI employees in the coming week. C.A. App. 156.
- The postal inspectors found respondent's explanation of his involvement in the recruitment of a new Postmaster General implausible. Respondent told them that, when Spartin called and asked for referrals, he did not really

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[1] The entry, dated January 27, 1987, reads as follows:

- lot of homework
- drive a wedge between people (intimidate)
- answer "I don't know, I really can't remember"
- excitable
- all kinds of scenarios
- ask same questions over and over
- don't show him how smart you are
- don't relax
- long interrogation (tough questions at end)
- possible subpoena

Pet. App. 23a-24a.

> believe that Spartin was recruiting a new Postmaster General. That statement seemed implausible because respondent not only gave Spartin the names of candidates, but made an introductory telephone call to one of them. The inspectors were also informed by Spartin that he and respondent had agreed to say that it was respondent who called Spartin, even though it was in fact Spartin who placed the call. C.A. App. 153, 274-275.

After considerable deliberation, including 24 separate meetings during a seven-month period, the United States Attorney for the District of Columbia decided to seek an indictment of respondent, Reedy, and REI. In October 1988, a grand jury returned a seven-count indictment charging them with conspiracy to defraud the United States, in violation of 18 U.S.C. 371; mail and wire fraud, in violation of 18 U.S.C. 1341, 1343, and 2; theft of property used by the Postal Service, in violation of 18 U.S.C. 1707 and 2; and receiving stolen property, in violation of District of Columbia law. The indictment alleged that respondent and Reedy participated in the kickback scheme and the scheme involving the search for a Postmaster General. The lead prosecutor in the case was Assistant United States Attorney (AUSA) Joseph Valder. Pet. App. 4a-5a, 131a-132a; C.A. App. 294-296.

Respondent, Reedy, and REI pleaded not guilty to the charges, and proceeded to trial. At the close of the government's case, the district court granted the defendants' motion for judgment of acquittal, finding the evidence insufficient to support a reasonable inference that they knew of either criminal scheme. *United*

States v. *Recognition Equip. Inc.*, 725 F. Supp. 587 (D.D.C. 1989).

c. Respondent thereafter brought this *Bivens* action in the United States District Court for the Northern District of Texas, where respondent resided. The defendants in the civil case were AUSA Valder and six postal inspectors—petitioners and a postal inspector who has since died—who had worked on the investigation and prosecution. Respondent alleged a number of constitutional violations, including malicious prosecution and retaliatory prosecution in violation of the First Amendment. The theory of the complaint was that respondent was prosecuted in retaliation for his criticism of Postal Service policy concerning OCR technology. Respondent later filed a separate suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671-2680. Pet. App. 5a-6a, 46a, 113a-115a.

2. a. The district court dismissed all claims against AUSA Valder on the ground of absolute immunity and dismissed all claims against the postal inspectors, except the claims of malicious prosecution and retaliatory prosecution, on the ground of qualified immunity. The court then ruled that it lacked personal jurisdiction over the postal inspectors and transferred the case to the United States District Court for the District of Columbia. It also transferred the FTCA case. Pet. App. 152a-165a.

After the transfer, the cases were consolidated. The district court then dismissed respondent's claims of malicious prosecution and retaliatory prosecution, holding that the allegations did not satisfy the heightened pleading standard under then-applicable circuit law for *Bivens* claims asserting an unconstitutional motive.

The court also dismissed the FTCA claims. Pet. App. 129a-151a.

b. Respondent appealed, and the court of appeals affirmed in part and reversed in part. Pet. App. 112a-128a. The court of appeals held that Valder was entitled to absolute immunity for certain of his alleged actions but not for others. *Id.* at 116a-123a. As for respondent's claims against the postal inspectors, the court affirmed the dismissal of the malicious-prosecution claim, because "it has not been clearly established that malicious prosecution violates any constitutional or statutory right," but reversed the dismissal of the retaliatory-prosecution claim, because that claim "does allege the violation of clearly established law" and "meet[s] any applicable heightened pleading standard." *Id.* at 124a-126a. The court of appeals also reinstated some of respondent's FTCA claims. *Id.* at 126a-128a.[2]

3. a. On remand, the district court granted Valder's motion for summary judgment, holding that respondent could not establish that Valder brought the prosecution to retaliate against respondent for his First Amendment activity, because absolute immunity protected his decision to prosecute. The district court denied the postal inspectors' motion for summary judgment, however, and allowed limited discovery on the question whether they had the requisite retaliatory motive. The court also granted the United States' motion for judgment on the pleadings on the FTCA claims. Pet. App. 59a-111a.

b. Respondent again appealed, and the court of appeals again affirmed in part and reversed in part. Pet. App. 43a-58a. The court of appeals held that the

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[2] Valder filed a petition for a writ of certiorari at that stage, which this Court denied. *Valder* v. *Moore*, 519 U.S. 820 (1996).

district court had correctly granted summary judgment for Valder, but it reinstated one of respondent's FTCA claims (for malicious prosecution). *Id.* at 48a-58a.[3]

4. On remand, the postal inspectors again moved for summary judgment, arguing that "they enjoy qualified immunity because probable cause supported [respondent's] prosecution." Pet. App. 6a. The United States also moved for summary judgment on respondent's malicious-prosecution claim under the FTCA. Concluding that "[t]here are material facts in dispute," the district court denied the motion in a one-paragraph order. *Id.* at 42a. The district court subsequently denied a motion for reconsideration. *Id.* at 32a-41a.

5. Petitioners (but not the United States) appealed, and the court of appeals affirmed. Pet. App. 1a-31a. The court of appeals first held that it had jurisdiction over petitioners' appeal, reasoning that the district court's denial of qualified immunity turned on an issue of law and was therefore a collateral order subject to immediate appeal despite the absence of a final judgment. *Id.* at 7a-9a. The court then held that petitioners' motion for summary judgment had been properly denied. *Id.* at 10a- 31a. Recognizing that a defendant in a *Bivens* suit is entitled to qualified immunity unless he violated a clearly established right, the court concluded that retaliatory prosecution violates the First Amendment even when there is probable cause for the charges, and that that principle was clearly established at the time the charges were brought against respondent. *Ibid.* The court therefore did not decide whether there was probable cause for the charges (or whether it was reasonable for petitioners to

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[3] This time, Moore filed a petition for a writ of certiorari, which this Court denied. *Moore* v. *Valder*, 531 U.S. 978 (2000).

believe there was probable cause). *Id.* at 12a. Instead, the court remanded for trial on the question whether petitioners had a retaliatory motive. *Id.* at 31a.

a. The court of appeals held that the first question in the qualified-immunity inquiry—whether probable cause defeats a claim of retaliatory prosecution—"has already been answered" by the District of Columbia Circuit, in a case called *Haynesworth* v. *Miller*, 820 F.2d 1245 (1987). Pet. App. 12a. That case, the court said, "described the 'essential elements of a retaliatory-prosecution claim,'" and did not "suggest that lack of probable cause is an element." *Id.* at 12a-13a (quoting *Haynesworth*, 820 F.2d at 1257 n.93). The court explained that, under the standard articulated in *Haynesworth*, "once a plaintiff shows protected conduct to have been a motivating factor in the decision to press charges, the burden shifts to the officials to show that they would have pursued the case anyway." *Id.* at 13a. The court went on to say that "that description of the tort was part of *Haynesworth*'s holding, [and] we lack authority to disregard it." *Id.* at 14a.

Citing decisions of the Second, Third, Fifth, Eighth, and Eleventh Circuits, the court recognized that "several other circuits" do "require lack of probable cause in retaliatory prosecution actions." Pet. App. 15a. But those decisions, the court said, "are not the law of this circuit—*Haynesworth* is." *Ibid.* The court also noted that two other circuits—the Sixth and the Tenth—do not require a showing of a lack of probable cause. *Ibid.* The court found support for its approach in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), which involved a public school teacher's claim that he had been fired because of his First Amendment activity. Pet. App. 15a-16a. In that case, the court of appeals explained, a showing that

the First Amendment activity was a "motivating factor" in the teacher's firing was deemed sufficient to shift the burden to the school board to establish that "it would have reached the same decision" even in the absence of the constitutionally protected conduct. *Ibid.* (quoting *Mt. Healthy*, 429 U.S. at 287).

While the court of appeals thought "*Haynesworth*'s binding effect" sufficient "to end the first part of [the] qualified immunity inquiry," the court acknowledged that petitioners had "raised serious objections to [its] approach," and thus deemed it "useful to flesh out the reasons why the existence of probable cause should not necessarily preclude liability." Pet. App. 16a. In the court's view, probable cause is "designed for the ordinary arrest or prosecution where courts may presume that government officials exercised their discretion in good faith," not cases where the plaintiff can "demonstrate hostility to free speech to have been a motivating factor in the decision to prosecute." *Ibid.* The court of appeals acknowledged this Court's admonition in the analogous context of a selective-prosecution claim that prosecutorial discretion is a "core executive constitutional function." *Id.* at 17a (quoting *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996)). But the court of appeals nevertheless rejected petitioners' argument that, just as a claim of selective prosecution requires an "objective" showing that similarly situated defendants were not prosecuted, see *Armstrong*, 517 U.S. at 465, a claim of retaliatory prosecution requires an "objective" showing that there was no probable cause for the prosecution. Pet. App. 17a-18a.

The court of appeals characterized its theory of liability as "limited," because, in its view, a showing of probable cause "will be enough in most cases to establish that prosecution would have occurred absent

bad intent." Pet. App. 19a. Recovery will be possible, the court said, only in the "rare cases where strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus." *Id.* at 20a. The court thought that the case before it was "an example of this rare circumstance." *Ibid.*

b. The court of appeals held that the second question in the qualified-immunity inquiry—whether it was clearly established that probable cause does not defeat a claim of retaliatory prosecution—was also answered by *Haynesworth*. That case, the court said, was "[d]ecided in 1987, a year before [respondent's] indictment," and it "clearly stated the elements of retaliatory prosecution, leaving no doubt that government officials could be liable for pressing charges they would not have pursued without bad motive." Pet. App. 29a. The court held that the law was clearly established despite the fact that *Haynesworth* addressed the nature of a First Amendment retaliatory-prosecution claim "without analysis in a footnote in an opinion generally addressing other issues," because "qualified immunity requires only that the law be clear, not that it be stated prominently or elaborately." *Ibid.* (quoting Pet. C.A. Reply Br. 12). The court also found it irrelevant that other circuits do require an absence of probable cause, because "a decision of this court—*Haynesworth*— provided guidance on exactly the issue [petitioners] confronted." *Id.* at 30a.

REASONS FOR GRANTING THE PETITION

Under well-established principles of qualified immunity, federal officers sued under *Bivens* are not liable for damages unless they violated "clearly established statutory or constitutional rights of which a reasonable

person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In deciding a question of qualified immunity, courts "first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and, if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999) (quoting *Conn* v. *Gabbert*, 526 U.S. 286, 290 (1999)). The court of appeals held that, in order to make out a First Amendment claim of retaliatory prosecution, a plaintiff need not establish that the prosecution was not supported by probable cause. It also held that the law to that effect was clearly established when the charges were filed against respondent. The court of appeals' first holding conflicts with decisions of five other circuits and is incorrect. It also has recurring importance, because it "threatens to chill law enforcement by subjecting [officers'] motives and decision-making to outside inquiry," *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte* v. *United States*, 470 U.S. 598, 607 (1985)), whenever retaliation is alleged. This Court should therefore review that holding, as well as the court of appeals' second holding, which is closely related to the first.

A. The Court Of Appeals' Holding That The Existence Of Probable Cause Does Not Defeat A Claim Of Retaliatory Prosecution Conflicts With Decisions Of Five Other Circuits

Petitioners' submission is that, regardless of law enforcement officers' motives for bringing criminal charges, a plaintiff cannot establish retaliatory prosecution by federal officials in a *Bivens* case (or state officials in a suit brought under 42 U.S.C. 1983) if there was probable cause for the charges. Five circuits—the

Second,[4] Third,[5] Fifth,[6] Eighth,[7] and Eleventh[8]—have so held. In contrast, three circuits—the District of

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[4] See *Mozzochi* v. *Borden*, 959 F.2d 1174, 1179-1180 (2d Cir. 1992) ("[B]ecause there was probable cause in this case to believe that [the plaintiff] violated the [criminal] statute, we will not examine the defendants' motives in reporting [the plaintiff's] actions to the police for prosecution."); *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995) ("[I]f the officer * * * had probable cause * * * , then we will not examine the officer's underlying motive in arresting and charging the plaintiff."), cert. denied, 517 U.S. 1189 (1996); *Curley* v. *Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001) ("[B]ecause defendants had probable cause to arrest plaintiff, an inquiry into the underlying motive for the arrest need not be undertaken.").

[5] See *Merkle* v. *Upper Dublin Sch. Dist.*, 211 F.3d 782, 796 (3d Cir. 2000) ("An employer incurs no risk of a suit for malicious prosecution [in violation of the First Amendment] when the employer has probable cause to believe that its employee ha[s] committed a criminal violation.").

[6] See *Keenan* v. *Tejeda*, 290 F.3d 252, 260 (5th Cir. 2002) ("[R]etaliatory criminal prosecutions in violation of the First Amendment are actionable only if a plaintiff can * * * prove the common-law elements of malicious prosecution, including the absence of probable cause to prosecute."); *Izen* v. *Catalina*, 398 F.3d 363, 367-368 (5th Cir. 2005) ("to make out a retaliation claim," plaintiffs "in the prosecution context" must "establish each of the common law malicious prosecution elements," one of which is "an absence of probable cause to prosecute") (quoting *Keenan*, 290 F.3d at 257).

[7] See *Smithson* v. *Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000) (because of "the finding of probable cause to believe that [the plaintiff] was violating the * * * ordinance, * * * the [First Amendment] claim of pretext [for the arrest] is immaterial").

[8] See *Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002) (rejecting claim that plaintiff "was arrested in retaliation for her constitutionally protected speech," because, "[w]hatever the officers' motivation, * * * the existence of probable cause to arrest [the plaintiff] defeats her First Amendment claim"); *Wood*

Columbia Circuit (in this case) and the Sixth[9] and Tenth[10] Circuits—have held that the existence of probable cause does not defeat a claim of retaliatory prosecution. There is thus a five-to-three circuit conflict on the first question presented in the petition. That conflict was acknowledged by the court below, see Pet. App. 15a, and has since been acknowledged by the Fifth Circuit, see *Izen* v. *Catalina*, 398 F.3d 363, 368 n.7 (2005).[11]

B. The Court Of Appeals' Holding That The Existence Of Probable Cause Does Not Defeat A Claim Of Retaliatory Prosecution Is Incorrect

Like a claim of selective prosecution, a claim of retaliatory prosecution requires an objective showing in addition to the showing that the officer-defendants acted with an improper motive. For a claim of

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v. *Kesler*, 323 F.3d 872, 883 (11th Cir.) ("Th[e] retaliatory prosecution claim * * * is * * * defeated by the existence of probable cause."), cert. denied, 540 U.S. 879 (2003); *Draper* v. *Reynolds*, 369 F.3d 1270, 1277 n.11 (11th Cir.) (rejecting claim that defendant violated plaintiff's First Amendment rights by "arrest[ing] him for proclaiming his innocence," because "[the defendant] had probable cause to arrest [the plaintiff] regardless of [his] motivation"), cert. denied, 125 S. Ct. 507 (2004).

[9] See *Greene* v. *Barber*, 310 F.3d 889, 896-897 (6th Cir. 2002) ("[T]he existence of probable cause would not justify the arrest if * * * the arrest was the product of an improper motive.").

[10] See *Poole* v. *County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001) (fact that "conduct warranted the charges" is "not relevant to [the] First Amendment claim" of retaliatory prosecution).

[11] The Fifth Circuit decision states that the minority view has also been adopted by the Seventh Circuit. See *Izen*, 398 F.3d at 368 n.7. But it does not cite any decision of that court, and we are not aware of any Seventh Circuit decision that addresses the issue. The reference to the Seventh Circuit, therefore, was apparently inadvertent.

retaliatory prosecution, the required objective showing is an absence of probable cause, which is an essential element of the analogous common-law tort of malicious prosecution. The court of appeals erred in holding otherwise.

1. Because the prosecution of crimes is a "special province" of the Executive Branch, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999); *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985), courts are "properly hesitant to examine the decision whether to prosecute," *Wayte* v. *United States*, 470 U.S. at 608. As this Court has explained, judicial deference to prosecutorial decisionmaking has two related justifications. The first is "the relative competence of prosecutors and courts," *Armstrong*, 517 U.S. at 465, for "the decision to prosecute is particularly ill-suited to judicial review," *Wayte*, 470 U.S. at 607. As the Court has recognized, factors like "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan" are not "readily susceptible to the kind of analysis the courts are competent to undertake." *Ibid.* The second justification for judicial deference in this area is "a concern not to unnecessarily impair the performance of a core executive constitutional function." *Armstrong*, 517 U.S. at 465. Examining the underlying motivations for a prosecution "[can] delay[] the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Wayte*, 470 U.S. at 607.

Because the "systemic costs" of judicial inquiry in this area are of "particular concern," *Wayte*, 470 U.S. at

607, this Court's decisions involving a claim of selective prosecution, in violation of the defendant's equal protection rights, have "taken great pains to explain that the standard is a demanding one," *Armstrong*, 517 U.S. at 463, and that "a selective prosecution claim is [therefore] a *rara avis*," *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 489. That is true even though government actions based on race are generally subject to highly exacting review. See, *e.g.*, *Johnson* v. *California*, 125 S. Ct. 1141, 1146-1152 (2005). The "particularly demanding" standard for claims of selective prosecution, *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 489, has both a subjective and an objective component. To prevail, the claimant must show not only that the decision to prosecute "was motivated by a discriminatory purpose," but also that it "had a discriminatory effect." *Wayte*, 470 U.S. at 608. When the allegation is that the prosecution was racially motivated, the latter, objective, requirement means the defendant must show that "similarly situated individuals of a different race were not prosecuted." *Armstrong*, 517 U.S. at 465.

Under this Court's cases, therefore, a claimant cannot establish a selective-prosecution claim merely by showing that the claimant's race was a but-for motivation for the prosecution. In this case, by contrast, the court of appeals held that a claimant *can* make out a *retaliatory*-prosecution claim merely by showing that the claimant's *speech* was a but-for motivation for the prosecution. There is no basis for treating these two closely analogous types of constitutionally prohibited prosecutions differently. Free speech rights are important to criminal defendants, but no more so than the equal protection of the laws. Likewise, the exercise of the power to prosecute—"one of the core powers of

the Executive Branch," *Armstrong*, 517 U.S. at 467—is no less important to the government when it is challenged under the First Amendment than when it is challenged under the equal-protection component of the Due Process Clause. Accordingly, if a selective-prosecution claimant must make an objective showing before a court may take the extraordinary step of inquiring into the government's motives for bringing criminal charges, some objective showing is likewise required of a retaliatory-prosecution claimant.

2. This Court "frequently consult[s] * * * common law in attempting to determine the content of constitutional provisions." *Loving* v. *United States*, 517 U.S. 748, 779 (1996) (Thomas, J., concurring in the judgment).[12] The common-law analog of a claim of retaliatory prosecution in violation of the First Amendment is the tort of malicious prosecution. Indeed, a First Amendment-based claim of retaliatory prosecution can be viewed simply as one *form* of the tort of malicious prosecution. The common-law tort requires proof that the prosecution was commenced "primarily for a purpose other than that of bringing an offender to justice," Restatement (Second) of Torts § 653, at 406 (1977), and a retaliatory prosecution is a prosecution commenced for one such purpose: retaliating for the exercise of First Amendment rights. That is why a claim of retaliatory prosecution has been aptly described as "a First Amendment claim of malicious prosecution." *Johnson* v. *Louisiana Dep't of Agric.*, 18 F.3d 318, 320 (5th Cir. 1994).

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[12] See, *e.g.*, *United States* v. *Booker*, 125 S. Ct. 738, 753 (2005); *Crawford* v. *Washington*, 541 U.S. 36, 54 (2004); *Wilson* v. *Arkansas*, 514 U.S. 927, 931 (1995); *Branzburg* v. *Hayes*, 408 U.S. 665, 685 (1972).

As this Court recognized in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), an essential element of the common-law tort of malicious prosecution is that "the prior proceeding was without probable cause." *Id.* at 485 n.4.[13] One rationale for that principle is the "obvious polic[y] of the law in favor of encouraging proceedings against those who are apparently guilty." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 119, at 876 (5th ed. 1984). In light of this common law rule, the majority of the courts of appeals to consider the question are correct in holding that absence of probable cause is a necessary objective element of the constitutional claim of retaliation in the special context of prosecutorial decisionmaking.

C. Whether The Existence Of Probable Cause Defeats A Claim Of Retaliatory Prosecution Is A Question Of Recurring Importance

The court of appeals' decision will routinely allow courts and civil juries to conduct an after-the-fact "[e]xamin[ation] [of] the basis of a prosecution," *Wayte*, 470 U.S. at 607, in retaliatory-prosecution cases, because probable cause is irrelevant and there is no other objective screen. In addition, the decision may well increase the number of retaliatory-prosecution actions that are brought, because the existence of probable cause is not an obstacle to suit and "a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions" to

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[13] See, *e.g.*, Restatement (Second) of Torts § 653, at 406 (plaintiff must prove that defendant "initiate[d] or procure[d] the proceedings without probable cause"); 8 Stuart M. Speiser et al., *The American Law of Torts* § 28:7, at 38 (1991) ("it is fundamental that lack or want of probable cause is an essential element for successful pursuance of such an action").

those responsible for his prosecution. *Imbler* v. *Pachtman*, 424 U.S. 409, 425 (1976). That is one of the justifications for absolute immunity for prosecutors. See *Burns* v. *Reed*, 500 U.S. 478, 485 (1991); *Imbler*, 424 U.S. at 425. The court of appeals' decision is also likely to make litigation more expensive and time-consuming, because defendants cannot terminate the suit at an early stage through a showing of probable cause and an improper motive is "easy to allege and hard to disprove." *Crawford-El* v. *Britton*, 93 F.3d 813, 821 (D.C. Cir. 1996), vacated on other grounds, 523 U.S. 574 (1998). The standard adopted by the court of appeals thus threatens to "undermine prosecutorial effectiveness," *Wayte*, 470 U.S. at 607, by "revealing the Government's enforcement policy," *ibid.*, diverting officers from their duties, and generally "chill[ing] law enforcement," *ibid.* These threats are most pronounced in the area of public corruption, where, by virtue of their interactions with government officials, subjects and targets of criminal investigations will frequently be in a position to assert a First Amendment claim.

The court of appeals insisted that its standard *is* "[r]espectful of executive discretion," because it "allows the government to proceed with prosecutions that, though motivated in part by hostility to First Amendment activity, can be justified on legitimate grounds." Pet. App. 17a. But a legal standard is not "[r]espectful of executive discretion" merely because it requires an ultimate finding that "hostility to speech [was] a but-for cause of the prosecution." *Ibid.* As this Court's selective-prosecution cases make clear, inquiry into law enforcement officers' motives for bringing a prosecution should be the exception rather than the rule, and should be limited to cases where the claimant can make the requisite objective showing at the threshold. The court

of appeals' standard permits an inquiry into motives in *every* retaliatory-prosecution case, and thus interferes with "one of the core powers of the Executive Branch," *Armstrong*, 517 U.S. at 467, regardless of whether the officers are ultimately found to have had an improper motive that was the but-for cause of the prosecution. The notion that the court of appeals' decision is sensitive to the *special* considerations applicable to prosecutorial decisionmaking is particularly difficult to reconcile with the fact that its standard is identical to the one applied in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), which involves retaliatory action against an *employee* by a public *employer*. See Pet. App. 15a-16a (relying on *Mt. Healthy*).

The court of appeals also claimed that its "theory of liability" is "limited" because "probable cause ordinarily suffices to initiate a prosecution," and a showing of probable cause will therefore "be enough in most cases to establish that prosecution would have occurred absent bad intent." Pet. App. 19a. As an initial matter, a legal standard for retaliatory prosecution cannot reasonably be viewed as "limited" when, regardless of the ultimate outcome, it permits inquiry in every case into law enforcement officers' motives for bringing criminal charges. Beyond this basic flaw, it is hard to see why a showing of probable cause will ordinarily enable officer-defendants to prevail, especially without a full trial. As the court of appeals itself recognized, "probable cause usually represents only one factor among many in the decision to prosecute—some others being the strength of the evidence, the resources required for the prosecution, the relation to enforcement priorities, and the defendant's culpability." *Id.* at 13a. Accord *Armstrong*, 517 U.S. at 465; *Wayte*, 470 U.S. at

607. There are thus likely to be many cases in which there is not "weak," Pet. App. 20a, but strong probable cause, and the jury nevertheless finds for the plaintiff, based on its assessment of whether the many other considerations that bear upon the exercise of prosecutorial discretion would have resulted in the filing of charges absent an improper motive.

D. The Court Should Also Grant Certiorari To Decide Whether, If The Existence Of Probable Cause Does Not Defeat A Claim Of Retaliatory Prosecution, The Law Was Clearly Established At The Time Of The Challenged Conduct

1. The court of appeals also erred in holding that the law petitioners are alleged to have violated was clearly established. At the time respondent was indicted (October 1988), no court had squarely addressed the question whether probable cause is relevant to a claim of retaliatory prosecution. And since that time, "a split among the Federal Circuits [has] in fact developed on the question." *Wilson* v. *Layne*, 526 U.S. at 618. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Ibid.*

The court of appeals believed that *Haynesworth* (a 1987 case) *had* held that the existence of probable cause does not defeat a claim of retaliatory prosecution. Pet. App. 29a-31a. But that view is mistaken. No question concerning the relationship between retaliatory prosecution and probable cause was presented in that case.

In holding that *Haynesworth* had decided the issue presented here, the court of appeals relied on the fact that a footnote in the opinion that described the burdens of proof in adjudicating a retaliatory-prosecution claim—and introduced that discussion as

identifying the "essential elements" of such a claim—did not refer to the presence or absence of probable cause. Pet. App. 12a-13a. (quoting *Haynesworth*, 820 F.2d at 1257 n.93).[14] But some cases that *have* held that the existence of probable cause defeats a claim of retaliatory prosecution did not list the absence of probable cause as one of the "elements" of the retaliation claim.[15] Moreover, the elements of retaliatory prosecution were not at issue in *Haynesworth*, so the description of the mechanics for adjudicating such a claim was dictum. The question before the court was not whether a claim of retaliatory prosecution had been

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[14] The relevant portion of the *Haynesworth* footnote reads as follows:

> The Court should consider whether the plaintiffs have shown, first, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct. If the Court concludes that the plaintiffs have successfully discharged their burden of proof on both of these issues, it should then consider a third: whether the State has shown by a preponderance of the evidence that it would have reached the same decision as to whether to prosecute even had the impermissible purpose not been considered.

820 F.2d at 1257 n.93 (quoting *Wilson* v. *Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979)).

[15] See *Keenan* v. *Tejeda*, 290 F.3d at 258-260 (listing elements of "First Amendment retaliation claim" similar to those described in *Haynesworth* and noting elsewhere that, in retaliatory-prosecution case, plaintiff must prove elements of common-law tort of malicious prosecution); *Curley* v. *Village of Suffern*, 268 F.3d at 73 (listing elements of "First Amendment retaliation claim" similar to those described in *Haynesworth* and then noting that there is no inquiry into motive—the second element—if there was probable cause).

stated at all, but whether a claim had been stated against defendants who had only an indirect connection to the challenged conduct.[16] Thus, to the extent that *Haynesworth* can be said to stand for the proposition that the absence of probable cause is not a requirement in a retaliatory-prosecution case, the source of the proposition is a negative implication from obiter dictum in a footnote. That is a far cry from clearly established law.

2. When this Court grants certiorari in a *Bivens* or Section 1983 case to decide whether the defendant official violated a constitutional right, it ordinarily also grants certiorari on the second component of the qualified-immunity inquiry—whether the right was clearly established at the time of the alleged violation.[17] That practice is sensible, because the two issues are closely related. Indeed, they are part of the same ultimate question, which is whether the officer is entitled to qualified immunity. Cf. *Mitchell* v. *Forsyth*, 472 U.S. 511, 530-535 (1985) (granting certiorari on general question whether petitioner was entitled to qualified immunity and addressing both components of question).

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[16] As the court explained, the defendants "d[id] not dispute" that the challenged conduct was unconstitutional, *Haynesworth*, 820 F.2d at 1255, and the district court's entry of judgment for them was "not based on any defect in the constitutional claim alleged," *id.* at 1258. Instead, the judgment under review was "premised on a determination that these defendants were not sufficiently implicated in the retaliatory prosecution averred to establish liability." *Ibid.*

[17] See, *e.g.*, *Devenpeck* v. *Alford*, 125 S. Ct. 588 (2004); *Groh* v. *Ramirez*, 540 U.S. 551 (2004); *Hanlon* v. *Berger*, 526 U.S. 808 (1999) (per curiam); *Wilson* v. *Layne*, 526 U.S. 603 (1999); *Conn* v. *Gabbert*, 526 U.S. 286 (1999); *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998).

Since, for the reasons explained above, certiorari is warranted on the first question presented in the petition, the Court, in keeping with its usual practice, should also grant certiorari on the second question. That course is especially warranted here, because the basis for the court of appeals' conclusion that the law was clearly established was a negative inference from dictum in a footnote in a prior decision in which the elements of a retaliatory prosecution claim were not at issue. Moreover, if the Court grants review on the merits of the constitutional dispute, it can evaluate the qualified-immunity question in the broader context of the court of appeals decisions that have addressed the constitutional question. Cf. *Wilson* v. *Layne*, 526 U.S. at 618. Whether qualified immunity exists here presents an important issue of law.[18]

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[18] Because the court of appeals affirmed the denial of petitioners' summary judgment motion and remanded for trial, the case is in an interlocutory posture. That is not a reason to deny certiorari, however, because qualified immunity is "an entitlement not to stand trial," which is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell* v. *Forsyth*, 472 U.S. at 526. Many of this Court's qualified-immunity cases reviewed court of appeals decisions holding that the officer defendants were not entitled to summary judgment. See, *e.g.*, *Brosseau* v. *Haugen*, 125 S. Ct. 596 (2004) (per curiam); *Chavez* v. *Martinez*, 538 U.S. 760 (2003); *Saucier* v. *Katz*, 533 U.S. 194 (2001).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No.

In the Supreme Court of the United States

MICHAEL HARTMAN, ET AL., PETITIONERS

v.

WILLIAM MOORE, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5241

WILLIAM G. MOORE, JR., APPELLEE

v.

MICHAEL HARTMAN, ET AL., APPELLANTS

Argued: Sept. 15, 2004
Decided: Nov. 9, 2004

Before: SENTELLE and TATEL, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge TATEL.

TATEL, Circuit Judge:

Qualified immunity generally shields public officials from civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). In this case, appellee William G. Moore, Jr., claims that government officials—in particular six postal inspectors—pursued criminal charges against him in retaliation for his political activities. The postal inspectors argue that even though the criminal charges against Moore were dismissed, they enjoy qualified immunity because probable cause supported the prosecution. At the time of

Moore's indictment, however, the clearly established law of this circuit barred government officials from bringing charges they would not have pursued absent retaliatory motive, regardless of whether they had probable cause to do so. Because a reasonable jury could find on the basis of the record before us that Moore's prosecution violated this standard, we reject the inspectors' immunity defense and affirm the district court's denial of summary judgment on this issue.

I.

In the mid-1980s, William G. Moore, Jr., served as CEO of Recognition Equipment, Inc. ("REI"), a company specializing in optical scanning technology. Among other products, REI produced a multi-line optical character reader ("MLOCR")—a device capable of mechanically interpreting multiple lines of text. Encouraged by some $50 million in research and development funding REI had received from the U.S. Postal Service ("USPS"), Moore urged Postmaster General ("PMG") William F. Bolger to consider purchasing REI's MLOCRs to aid the USPS in automating its mail sorting functions. Moore was disappointed, however. Since the late 1970s, the USPS had been pursuing an initiative, known as "Zip + 4," to add four digits to existing five-digit zip codes; with the new nine-digit codes, efficient automatic sorting required scanning only a single line of text, rather than the multiple lines read by REI's device. Accordingly, PMG Bolger—a staunch supporter of Zip + 4—announced in late 1983 that the USPS would stick with single-line optical character readers ("SLOCRs") instead of using REI's product.

Zip + 4, however, was politically controversial. "Bureaucratic arrogance," one senator called it. Another urged the USPS to "Zap the ZIP!!" In December 1981, the House Committee on Government Operations accused the USPS of "repeatedly overstat[ing] and misrepresent[ing] the benefits that might accrue" due to the nine-digit codes. And despite PMG Bolger's testimony that prohibiting Zip + 4 would "cut the Postal Service from the only major opportunity it now has to meet all its obligations at controlled costs," Congress imposed a two-year moratorium on Zip + 4 in July 1981 and barred the USPS from making the nine-digit codes mandatory.

Chagrined by PMG Bolger's procurement of SLOCRs, Moore plunged REI into the political fray. To members of Congress and USPS governors, he argued that REI's MLOCRs were superior technology because they were not dependent on Zip + 4. He also pointed out that unlike SLOCRs, REI's MLOCRs were American-made. USPS managers reacted angrily: PMG Bolger told Moore to "back off," and another top official told Moore REI would never receive USPS business. Moore's position nevertheless gained influence. Several members of Congress pressed REI's case with the USPS Board of Governors, and Representative Martin Frost, working closely with Moore, introduced legislation (later withdrawn) to force USPS to buy American-made MLOCRs. More important, the General Accounting Office (now the Government Accountability Office) and the Office of Technology Assessment ("OTA") produced reports concluding that the USPS's operational losses due to the use of SLOCRs rather than MLOCRs exceeded one million dollars a day. The OTA report attributed the procure-

ment of SLOCRs to unrealistic expectations for Zip + 4, noting that while MLOCR technology might have been inferior in the past, it was now "fully competitive," making it unreasonable for USPS to continue using single-line technology despite low usage of the nine-digit codes.

Responding to these pressures, the USPS Board of Governors voted in July 1985 to make a "mid-course correction" and switch to multi-line technology. Although this was just what Moore's media and lobbying campaign had sought, the result turned out unhappily for Moore and his company.

In the months following the mid-course correction, the USPS Postal Inspection Service uncovered two criminal schemes relating, at least incidentally, to REI. The first, a kickback arrangement, involved a USPS Governor, Peter Voss, and a consulting firm, Gnau & Associates, Inc. ("GAI"), that REI had hired in connection with its lobbying campaign. As it turned out, GAI was paying Voss for referrals, and three GAI officers—John Gnau, Jr., Michael Marcus, and William Spartin—had agreed to share the proceeds of the REI contract with Voss. The second scheme, the details of which are unimportant to this case, involved Spartin's and REI's role in the search for a new PMG. In connection with these two schemes, Voss, Gnau, and Marcus pleaded guilty to criminal charges, while Spartin accepted immunity in exchange for cooperation.

Having uncovered these crimes, the postal inspectors sought to determine whether anyone at REI had participated in them. Following an investigation we describe in more detail below, a grand jury returned a seven-count indictment against Moore, REI, and REI's Vice President for Marketing, Robert Reedy, in

October 1988. The case went to trial a year later, but six weeks into the proceedings at the close of the government's case, the district court issued a judgment of acquittal. *See United States v. Recognition Equip. Inc.*, 725 F. Supp. 587, 587-88, 602 (D.D.C. 1989). Emphasizing a "complete lack of direct evidence to suggest the Defendants knew of the illegal payoff scheme," *id.* at 596, the district court concluded, "The government's evidence is insufficient, even when viewed in the light most favorable to it, for a trier of fact to find guilt beyond a reasonable doubt. Much of what the government characterizes as incriminating evidence is not persuasive of guilt when viewed in its full context. In fact, some of the government's evidence is exculpatory and points toward innocent conduct of the Defendants." *Id.* at 587-88.

Exonerated of the criminal charges, Moore set about obtaining civil damages for the harm to his life and career. Joined by his wife, Moore began by filing a complaint in the Northern District of Texas asserting constitutional claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), against the prosecutor and six postal inspectors (one of whom is now deceased). Shortly thereafter, the Moores filed a second complaint, also in the Northern District of Texas, seeking recovery from the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680. The Texas federal court dismissed Mrs. Moore's claims for lack of standing; found that absolute immunity barred the claims against the prosecutor; and, citing qualified immunity, threw out a Fifth Amendment abuse-of-process claim against the inspectors. *Moore v. Valder*, No. 91-2491 (N.D. Tex.

Sept. 21, 1992). The court transferred the remaining claims to the U.S. District Court for the District of Columbia, which dismissed the entire suit. *Moore v. Hartman*, No. 92-2288, 1993 WL 405785 (D.D.C. Sept. 24, 1993).

Reviewing the decisions of the D.C. and Texas district courts, we reinstated certain claims against the prosecutor and the United States along with a retaliatory prosecution *Bivens* claim against the postal inspectors. *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995) ("*Moore I*"). On remand, the district court denied the inspectors' motion for summary judgment, allowing limited discovery on the retaliatory prosecution claim. As to the prosecutor and the United States, however, the court again dismissed Moore's claims. *Moore v. Valder*, No. 92-2288 (D.D.C. Feb. 5, 1988). Moore appealed a second time, and we affirmed the district court's ruling except as to one FTCA claim not relevant here. *Moore v. United States*, 213 F.3d 705 (D.C. Cir. 2000) ("*Moore II*").

The inspectors, setting up the issue we now face, again sought summary judgment on the retaliatory prosecution claim, this time on the theory that they enjoy qualified immunity because probable cause supported Moore's prosecution. In the alternative, the inspectors argued that the record contained insufficient evidence of retaliatory motive. The district court denied the inspectors' motion in the following one-paragraph order:

> Upon consideration of the motion of defendants, United States and Michael Hartman, et al., for summary judgment and the response thereto, the Motion for Summary Judgment is DENIED. There are

material facts in dispute. The most significant are the facts surrounding the presentation of evidence to the grand jury and the disclosure of grand jury testimony as to a key prosecution witness.

The inspectors now appeal, arguing, as they did in the district court, that they enjoy qualified immunity because they had probable cause to pursue the criminal charges against Moore.

II.

Before addressing the merits of the inspectors' qualified immunity claim, we must consider whether we have jurisdiction over this interlocutory appeal. Though 28 U.S.C. § 1291 permits us to hear appeals only from "final decisions" of the district court, denial of a claim of qualified immunity falls within the "small class" of collateral orders subject to immediate appeal under that statute despite the absence of a final judgment. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-25, 530, 105 S. Ct. 2806, 2814-15, 86 L. Ed. 2d 411 (1985). The reason for this is simple: appeal after trial cannot remedy an erroneous denial of qualified immunity, since by then the defendant will already have suffered the burdens of litigation the immunity is intended to prevent. *See id.* at 525-30, 105 S. Ct. at 2814-18; *Int'l Action Ctr. v. United States*, 365 F.3d 20, 23 (D.C. Cir. 2004). As Moore observes, however, the collateral order doctrine applies only "to the extent [the denial of qualified immunity] turns on an issue of law." *Mitchell*, 472 U.S. at 530, 105 S. Ct. at 2817. Pointing out that many facts in the record are disputed, Moore argues that the inspectors cannot establish a "purely legal" issue subject to interlocutory appeal, *id.* at 530, 105 S. Ct. at 2817, unless they concede the plaintiff's view

of the facts—something Moore says the inspectors refuse to do. Accordingly, Moore argues, we lack jurisdiction to entertain the inspectors' appeal.

We have little trouble rejecting Moore's argument. Although in one interlocutory case where we found jurisdiction, we did describe the facts as "effectively conceded," *see Farmer v. Moritsugu*, 163 F.3d 610, 614 *(D.C. Cir. 1998)*, we never suggested that such a concession was required for jurisdictional purposes. In fact, such a requirement would conflict with *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996), which held that denial of a claim of qualified immunity remains an appealable collateral order even if the underlying facts are disputed—indeed, even if, as in this case, the district court denied the motion for summary judgment due to the presence of material issues of fact. *See id.* at 312-13, 116 S. Ct. at 841-42. While noting in reliance on *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), that "determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case," *Behrens* explained that the solution to a disputed record on qualified immunity is the same as in any other summary judgment case: the court determines "what facts the district court, in the light most favorable to the nonmoving party, likely assumed," performing "a cumbersome review of the record" if necessary. *Behrens*, 516 U.S. at 313, 116 S. Ct. at 842 (quoting *Johnson*, 515 U.S. at 319, 115 S. Ct. at 2159). Once the facts are established under that standard, an immunity claim like the inspectors' raises "the purely legal question of whether or not an official's actions violate clearly established law," no less than in an appeal based

on agreed facts. *See Meredith v. Fed. Mine Safety & Health Review Comm'n*, 177 F.3d 1042, 1048-49 (D.C. Cir. 1999). Such legal questions—which sharply divide the parties in this case—fall squarely within the collateral order doctrine as expounded in *Mitchell v. Forsyth*.

Though neither party raises the issue, we also note that our statement in *Moore I* that "Moore's retaliatory prosecution claim . . . does allege the violation of clearly established law," 65 F.3d at 196, neither deprives us of jurisdiction nor controls our resolution of the issues before us. The denial of qualified immunity at summary judgment is a "final decision" subject to immediate appeal even if the defendant previously appealed a denial of the same claim on a motion to dismiss. *See Behrens*, 516 U.S. at 309-11, 116 S. Ct. at 840-41. Thus, although the inspectors conceded in the appeal from their motion to dismiss that Moore's claim stated a violation of clearly established law, they are free to assert qualified immunity now: the "legally relevant factors bearing upon the [qualified immunity] question will be different on summary judgment than on an earlier motion to dismiss," because the court now conducts the immunity inquiry based on "the evidence before it," rather than the pleadings. *Id.* at 309, 116 S. Ct. at 840. Furthermore, as we explained in *Moore II*, our opinion in *Moore I* "said nothing about the elements of [a retaliatory prosecution claim], or whether Moore could succeed on his complaint." *Moore II*, 213 F.3d at 709. Accordingly, whether Moore's cause of action requires lack of probable cause remains a live issue.

III.

As the Supreme Court has recognized, although damages suits like Moore's "may offer the only realistic avenue for vindication of constitutional guarantees," such suits also carry substantial social costs, including the expense of litigation, the diversion of official energy, and the risk of deterring legitimate official action. *See Harlow*, 457 U.S. at 814, 102 S. Ct. at 2736. Striking "a balance between the evils inevitable in any available alternative," *id.* at 813, 102 S. Ct. at 2736, qualified immunity protects "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *id.* at 818, 102 S. Ct. at 2738. Underlying this doctrine is the basic principle of fair notice: officials may be held liable if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right," *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987); otherwise, the unfairness of holding officials responsible on grounds they could not have anticipated trumps the individual's interest in vindicating transgressed rights. *See id.* at 641, 107 S. Ct. at 3039; *Crawford-El v. Britton*, 523 U.S. 574, 590-91, 118 S. Ct. 1584, 1592-93, 140 L. Ed. 2d 759 (1998). To ensure that shielding public officials from unclear law does not freeze the law in place, however, courts facing qualified immunity claims ordinarily engage in a two-step inquiry, considering first what the law is, and only then whether that law was clearly established. *See Wilson v. Layne*, 526 U.S. 603, 609, 119 S. Ct. 1692, 1696, 143 L. Ed. 2d 818 (1999). Were the procedure otherwise,

constitutional avoidance might lead courts to rest on findings of uncertainty without first clarifying the law for future cases—a result contrary to the interest of both government officials and individuals claiming that such officials violated their constitutional rights. *See id.*; *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5, 118 S. Ct. 1708, 1714 n.5, 140 L. Ed. 2d 1043 (1998).

Because the qualified immunity inquiry focuses on whether the officials could have known "what [they were] doing" was unlawful, *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039, defining the right "at the appropriate level of specificity" is critical. *Wilson*, 526 U.S. at 615, 119 S. Ct. at 1700; *see also Butera v. District of Columbia*, 235 F.3d 637, 646 (D.C. Cir. 2001). While the right need not have arisen in identical or even "fundamentally" or "materially similar" circumstances, *see Hope v. Pelzer*, 536 U.S. 730, 739, 741, 122 S. Ct. 2508, 2515, 153 L. Ed. 2d 666 (2002), the right can be considered clearly established only if the unlawfulness was "apparent" in light of pre-existing law, *see Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039. The "salient question," then, is "whether the state of the law [at the relevant time] gave [the officials] fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Hope*, 536 U.S. at 741, 122 S. Ct. at 2516.

In this case, Moore seeks to vindicate his right to be free from prosecution undertaken in retaliation for First Amendment activity. The inspectors, though conceding that right generally exists, *see Crawford-El*, 523 U.S. at 592, 118 S. Ct. at 1593 (describing the "general rule" that "the First Amendment bars retaliation for protected speech" as one that "has long been clearly established"), urge us to define the claim more specifically. Insisting the record shows that they acted

with probable cause, the inspectors argue that what they were doing could violate a clearly established right only if the First Amendment prohibits retaliatory prosecution even when probable cause exists. Based on cases from other jurisdictions requiring lack of probable cause as an element of a retaliatory prosecution claim, the inspectors argue that no such right exists, much less a clearly established one. Moore disputes both points in the inspectors' syllogism: this circuit, he insists, clearly permitted liability despite probable cause at the time of his indictment, and in any event the inspectors acted without sufficient grounds for suspicion.

As instructed by *Wilson*, we consider this debate in two stages, asking first what the law is, and second whether that law was clearly established at the time of Moore's indictment. Because, as we shall explain, we agree with Moore that the inspectors may be liable even if they had probable cause, we have no need to determine whether, as the inspectors insist, they actually had probable cause to pursue Moore's indictment.

Were Moore's Rights Violated?

The question presented under the first element of the qualified immunity test—does the retaliatory prosecution cause of action require a lack of probable cause? —has already been answered by this circuit. In *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987), we described the "essential elements of a retaliatory-prosecution claim" as follows:

> The Court should consider whether the plaintiffs have shown, first, that the conduct allegedly retaliated against or sought to be deterred was consti-

> tutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct. If the Court concludes that the plaintiffs have successfully discharged their burden of proof on both of these issues, it should then consider a third: whether the State has shown by a preponderance of the evidence that it would have reached the same decision as to whether to prosecute even had the impermissible purpose not been considered.

Id. at 1257 n.93 (quoting *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979) (footnote omitted)). Nowhere does this statement suggest that lack of probable cause is an element of the claim, nor does its silence imply such a requirement. The standard *Haynesworth* articulated is this: once a plaintiff shows protected conduct to have been a motivating factor in the decision to press charges, the burden shifts to the officials to show that they would have pursued the case anyway. Given that probable cause usually represents only one factor among many in the decision to prosecute—some others being the strength of the evidence, the resources required for the prosecution, the relation to enforcement priorities, and the defendant's culpability—there is no reason to expect that the mere existence of probable cause will suffice under *Haynesworth* to protect government officials from liability.

The inspectors insist that this circuit has never "squarely addressed" the issue they raise, leaving us free to require lack of probable cause. (Appellant's Br. at 25.) Again reading *Haynesworth*, we disagree. The relevant passage reads as follows:

> We share the conviction . . . that retaliatory prosecution unconstitutionally impinges on the right of access to the courts guaranteed by the First Amendment. Haynesworth alleged that he was charged with disorderly conduct solely because he refused to release his civil claims against the arresting officers. That averment, we think, partakes from the circumstances enough substance to entitle him to proceed directly under the First Amendment for damages.

Haynesworth, 820 F.2d at 1257 (footnotes omitted). Because this conclusion—that plaintiff had stated a claim for retaliatory prosecution—required some vision of what the claim entailed, *Haynesworth*'s articulation of the elements was central to its holding. True enough, plaintiff described his prosecution as "unmerited," *id.* at 1255, and the opinion said the charges arose "*solely* because" of protected activity, *id.* at 1257 (emphasis added), implying, perhaps, that plaintiff was prosecuted without probable cause. As we noted above, however, *Haynesworth*'s description of the cause of action left little doubt that probable cause would not automatically immunize a retaliatory prosecution. Because that description of the tort was part of *Haynesworth*'s holding, we lack authority to disregard it.

Haynesworth, moreover, is not the only case in which we have suggested liability may arise regardless of probable cause. In *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425 (D.C. Cir. 1987), *overruled on other grounds by Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996) (en banc), *rev'd*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998), in which plaintiff alleged that police pressed charges to deter the vindication of civil rights, we noted "the at least arguable

existence of probable cause," yet went on to consider the sufficiency of the motive allegations. *Id.* at 1434. That disposition implied that a showing of probable cause, by itself, is insufficient to preclude liability. *Id.* at 1434. As the inspectors argue, *Martin* could be read to have simply assumed the validity of the claim so as to reach the motive issue, but the case at least reinforces the view that probable cause is not conclusive. Demonstrating the continuing vitality of *Haynesworth*, moreover, our two prior opinions in this case relied on that decision in discussing retaliatory prosecution. *See Moore I*, 65 F.3d at 196 & n. 12; *Moore II*, 213 F.3d at 709.

As the inspectors point out, several other circuits require lack of probable cause in retaliatory prosecution actions. *See, e.g., Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992); *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 796-97 (3d Cir. 2000); *Keenan v. Tejeda*, 290 F.3d 252, 260 (5th Cir. 2002); *Smithson v. Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000); *Redd v. City of Enterprise*, 140 F.3d 1378, 1383-84 (11th Cir. 1998). These cases, however, are not the law of this circuit—*Haynesworth* is. Besides, two other circuits agree with *Haynesworth*. *See Greene v. Barber*, 310 F.3d 889, 897-98 (6th Cir. 2002); *Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001). Our approach, moreover, comports with the Supreme Court's framework in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). In that case, which involved an untenured public school teacher's claim that the school board fired him because of his First Amendment activity, the Court explained that if the teacher could show his constitutionally protected conduct to have been a "motivating

factor" in the firing, the burden would shift to the board to establish that "it would have reached the same decision . . . even in the absence of the protected conduct." *Id.* at 287, 97 S. Ct. at 576. While the criminal context, of course, involves considerations of prosecutorial discretion absent in a school employment decision, *Mt. Healthy* provides considerable support for *Haynesworth*.

Although *Haynesworth*'s binding effect is enough to end the first part of our qualified immunity inquiry, the inspectors have raised serious objections to our approach, so we think it useful to flesh out the reasons why the existence of probable cause should not necessarily preclude liability. To begin with, probable cause, requiring no more than "information sufficient to warrant a prudent man in believing the suspect has committed or is committing an offense," *United States v. Kayode*, 254 F.3d 204, 209 (D.C. Cir. 2001) (internal quotations and alterations omitted), is designed for the ordinary arrest or prosecution where courts may presume that government officials exercised their discretion in good faith, so long as their actions were not obviously unfounded. Yet when plaintiffs demonstrate hostility to free speech to have been a motivating factor in the decision to prosecute—as in a prima facie case under *Haynesworth*—courts may no longer presume that appropriate considerations guided the government's decision-making. In such circumstances, were courts to demand no more than a showing of probable cause, as the inspectors urge, law enforcement officers could freely bring marginal cases against advocates of disfavored views, even if the officers' only reason for doing so were hostility to those views. The inspectors' approach, in other words, interprets the First Amend-

ment to prevent only baseless prosecutions, i.e., prosecutions lacking probable cause. As the inspectors see it, constitutional free speech protections say nothing about prosecutions brought only because the defendant is, say, a peace activist, a Klan member, a Democrat, or a Republican.

In our view, the First Amendment prohibits such targeted prosecutions, just as it prohibits legislation aimed at punishing free speech. To be sure, prosecutorial discretion is a "core executive constitutional function," *United States v. Armstrong*, 517 U.S. 456, 465, 116 S. Ct. 1480, 1486, 134 L. Ed. 2d 687 (1996), but as the Supreme Court has made clear, "the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights." *Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524, 1531, 84 L. Ed. 2d 547 (1985) (internal quotations and citations omitted). Respectful of executive discretion, *Haynesworth*'s framework allows the government to proceed with prosecutions that, though motivated in part by hostility to First Amendment activity, can be justified on legitimate grounds. When hostility to speech represents a but-for cause of the prosecution, however, the charges are "deliberately based upon an unjustifiable standard." *Id.*

We also disagree with the inspectors that analogous First Amendment *Bivens* claims call for imposing an "objective" threshold requirement relating to the defendant's culpability. Pointing out that "courts in other contexts have interposed rules requiring some objective showing before scrutinizing a criminal prosecution for bad faith or other ill motive," the inspectors

argue that lack of probable cause should be required in the retaliatory prosecution context because it affords "a ready-made (but not insurmountable) objective criterion as a first step in assessing prosecutorial discretion." (Appellant's Br. at 29-30.) Yet the two defenses the inspectors cite in support of their theory—selective prosecution and vindictive prosecution—are hardly irreconcilable with *Haynesworth*. It is true that a selective prosecution claim requires proof not only that prosecutors acted with bad intent, but also that "similarly situated individuals [outside the protected category] were not prosecuted." *Armstrong*, 517 U.S. at 465, 116 S. Ct. at 1487. But once that showing has been made, the accused has a defense to the charges. *See United States v. Mangieri*, 694 F.2d 1270, 1273 (D.C. Cir. 1982); *United States v. Steele*, 461 F.2d 1148, 1151-52 (9th Cir.1972). Thus, contrary to the inspectors' theory, selective prosecution doctrine supports our view that constraints on prosecutorial motive may at times override the interest in punishing objectively culpable conduct.

As for vindictive prosecution, that defense entails a framework much like the one *Haynesworth* adopted for retaliatory prosecution: if evidence indicates a "reasonable likelihood" that the government acted "to punish a defendant for exercising his legal rights," a presumption of vindictiveness arises, which the government may rebut with "objective information in the record justifying the increased sentence or charges." *United States v. Gary*, 291 F.3d 30, 34 (D.C. Cir. 2002) (quoting *Maddox v. Elzie*, 238 F.3d 437, 446 (D.C. Cir. 2001)). Though the government's burden under this standard may be lighter than under *Haynesworth*, in both cases prima facie evidence of bad motive triggers

an obligation on the government's part to show that permissible considerations supported its action. The standard the inspectors propose, in contrast, requires plaintiffs—the alleged victims—to establish lack of justification in the first instance.

Our reluctance to impose objective limitations finds support in the logic of *Crawford-El*. In that case, the Supreme Court held that while qualified immunity protects officers who comply with an objectively reasonable view of the law, it affords no protection against claims under clearly established law that entail the subjective element of improper intent. *See Crawford-El*, 523 U.S. at 593-94, 118 S. Ct. at 1594-95. Consistent with this reasoning, we see no reason why compliance with the objective probable cause standard should bar scrutiny of subjective motivations here. Other constraints identified in *Crawford-El*—procedural mechanisms for limiting discovery and facilitating summary judgment, as well as the opportunity to show the prosecution would have happened anyway, *id.* at 592-93, 597-601, 118 S. Ct. at 1593-94, 1596-98—may screen out baseless motive claims without precluding recovery in cases where officers pursue retaliatory charges they would not have undertaken but for their unconstitutional animus.

In sum, the law of this circuit, as expressed in *Haynesworth*, affords damages liability for prosecutions that would not have occurred without retaliatory motive, even if the officers involved acted on the basis of probable cause. This theory of liability, we hasten to stress, is limited. Given that probable cause ordinarily suffices to initiate a prosecution, that showing will be enough in most cases to establish that prosecution would have occurred absent bad intent. A *Bivens*

recovery remains possible, however, in those rare cases where strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus. In such circumstances, government officers cannot prevail under *Haynesworth* because they cannot establish that legitimate considerations supported their action.

Moore's case appears to be an example of this rare circumstance, at least when we view the evidence in the light most favorable to Moore, as we must at summary judgment, *see, e.g., Beckett v. Air Line Pilots Ass'n*, 59 F.3d 1276, 1278 (D.C.Cir.1995). Looking at the record through that lens, we detect not only strong evidence of retaliatory motive, but also quite weak indicators of probable cause.

Beginning with motive, we think the record permits, at the least, a reasonable inference that the inspectors had Moore's lobbying campaign in mind as they pursued his indictment. The inspectors referred explicitly to Moore's political activities in two reports summarizing the evidence in the REI investigation. The first, titled "Arguments for Indicting the Corporation," lists the following as the first of nine "bas[es]" for indicting REI:

> Independent of Voss/GAI actions, the corporation and its PAC funded a media and political campaign to discredit USPS management and cause financial harm to USPS, for example:
>
> a. staged questions and testimony before Congress
>
> b. Frost amendment to freeze USPS appropriations bill.

Similarly, a "Details of Offense" memorandum submitted to the U.S. Attorney's Office refers to REI's lobbying activities as evidence that Moore and Reedy (the REI vice president) had "intent to defraud the USPS":

> Moore's, Reedy's and REI's intent to defraud the USPS is evident in the following events and transactions that related to Voss' official influence but were independently initiated by Moore and Reedy.
>
> - On or about July 25, 1985, at Moore's and Reedy's suggestion and with their substantial input relative to its drafting, Congressman Frost proposed an amendment to a USPS appropriate [*sic*] bill that in effect would freeze USPS revenue until MLOCRs were purchased from REI.
>
> . . . .
>
> - During the period August 1985 to April 1986, REI continued to undermine the competitive testing program [an aspect of OCR procurement] via the media and Congress.

Read in Moore's favor, these documents suggest that the inspectors regarded Moore's speech and lobbying—activities clearly subject to First Amendment protection—as grounds for prosecution, even though these activities were "independent of Voss/GAI actions" (presumably a reference to the alleged conspiracy). Consistent with this view of the inspectors' motives, subpoenas in the REI investigation targeted speech and lobbying activity, seeking, among other things, "articles placed with trade publications and reporters," "interviews with journalists and reporters," "meetings

with United States Congressmen," and "consulting services or meetings with or regarding the REI Political Action Committee."

Reinforcing the inference that the prosecution would not have happened without retaliatory motive, the evidence supporting the government's case—again, viewed in the light most favorable to Moore—appears quite weak. To begin with, the strongest evidence connecting REI to the conspiracy related to Moore only indirectly. Though Voss, the corrupt USPS governor, called Moore at one point to ask "why hadn't it [a contract with GAI] been done," Voss gave his initial referral not to Moore, but to Reedy. Reedy may have known the GAI contract was fishy; at the least, information from Gnau about conversations he had with Reedy gave the inspectors reason to suspect as much. *See REI*, 725 F. Supp. at 593-94. In addition, Reedy, perhaps revealing a guilty conscience, initially lied to the inspectors about the source of the GAI referral. *Id.* at 595-96. Yet no record evidence indicates that Reedy shared with Moore whatever misgivings he may have had about the contract.

Attempting to connect Moore to the conspiracy, the inspectors point to several scribbles about Voss and GAI in a notebook Moore labeled "Postal." One entry, apparently dating from December 18, 1984, reads as follows:

> Get John Knau [*sic*] involved—have broad scale assoc w/ John—get together
>
> ---
>
> * Call Peter Voss
>
> ---
>
> "The business to be had here is substantial"

Another entry dated April 29, 1985 again mentions Gnau and Voss, while also referring to Zip + 4; to John McKean, the Chairman of the USPS Board of Governors; to Electrocom Automation, Inc., a competing producer of scanning technology; and to James Jellison, a top USPS official:

USPS—prudent to do contingency planning

- ZIP + 4 not going well
- Consultant—wired (Peter Voss)
- Inside vs outside control
- 100 systems—$150m-$250m
- McKean—West Point/airborne/Gonzaga HS
- Upgrade at Electrocom
- Jellison

Elsewhere, the notes appear to refer to information from a "closed session" of the USPS Board of Governors, and an entry dating from January 27, 1987—more than six months after Voss's guilty plea—suggests that Moore gave advice to employees in preparation for Postal Inspection Service interviews:

Critical Incident • Final "fishing trip"

• Lawyer in DC—late for hearing—Martin Luther King—no copy of transcript

(plea arrangement) —date of plea

—conversation between judge +

U.S. Attorney

- lot of homework
- drive a wedge between people (intimidate)
- answer "I don't know, I really can't remember"

- excitable
- all kinds of scenarios
- ask same questions over and over
- don't show him how smart you are
- don't relax
- long interrogation (tough questions at end)
- possible subpoena

Note [illegible] B/S list based (1/27) on high number of charges

The inspectors interpret these notes to show that Moore (1) formed a "broad scale" criminal association with Gnau and Voss, (2) sought "inside control" of the Board of Governors through a "wired" consultant (i.e., Gnau), and (3) obstructed the Postal Inspection Service investigation.

Reading the notes in Moore's favor, however, we think it at least as plausible that the notes reflect perfectly innocent business considerations, such as Moore's interest in forming a legitimate relationship with a well-connected lobbyist and protecting his employees from potentially damaging litigation. To be sure, as the inspectors point out, Moore's interview advice includes no instruction to tell the truth, while the instruction to answer "I don't know, I really can't remember" could suggest a coverup. But Moore points to evidence suggesting he did encourage his employees to tell the truth, and in light of that evidence, Moore's "I don't know" statement could mean nothing more than that he cautioned employees to avoid guesswork and speculation—guidance that, like Moore's other notes, reflects standard deposition advice.

Next, the inspectors think it suspicious that Moore's notebook was missing thirty-six of its eighty pages, and

that REI failed to locate certain subpoenaed phone records from late 1984 and early 1985—the "critical period," as the inspectors see it, for the formation of the conspiracy. Because Marcus told the inspectors he had heard from Spartin that "Reedy, Moore, Gnau and Voss . . . met and developed a story to cover up their involvement," the inspectors suspected that REI officials removed the pages and records to cover their tracks. Yet phone records were also missing from early 1984—long before the Voss referral—while REI produced other evidence (including at least one phone message) revealing contacts between Moore and Voss. As for the notebook, Moore explained during his deposition that he often tore out sheets for his secretary to type. Given the posture of this case, we must resolve these ambiguities in Moore's favor, leading us to conclude that the missing notes and records fail to establish a coverup.

Other evidence points to Moore's innocence. Though lacking any evident reason to protect Moore, not one of the conspiracy's admitted members fingered him. Spartin, for example, failed to corroborate Marcus's assertion that Moore and Reedy agreed to a coverup. In fact, despite extraordinary pressure—at one point as many as ten inspectors surrounded Spartin while an Assistant United States Attorney tore up his immunity agreement—Spartin never indicated that Moore knew of the conspiracy. Instead, Spartin stated that although he "[didn't] give a hoot and hell about Bill Moore," he would not "make up a story" to incriminate Moore. Asked whether "anyone in REI knew Peter Voss was involved in this scheme . . . or was being paid," Spartin offered only that other witness statements the inspectors had shown him suggested Moore's guilt:

"Let me answer you this way," Spartin said. "Being paid, no sir, I don't. I have no knowledge of that at all. Peter Voss being part of the deal, no knowledge. But, you know I read that goddamn testimony and I'm not a lawyer but Jesus, there's enough there to seem to me to hang REI from the yardarm." Voss even told the inspectors there was "no way Moore knew" of anything improper.

Recognizing the deficiencies in the inspectors' evidence, the U.S. Attorney's Office hesitated to indict—even though the inspectors urged it to do so. "The facts underlying this [proposed] indictment are complicated, and the evidence is entirely circumstantial," the Chief and Deputy Chief of Special Prosecutions wrote in a memo to the U.S. Attorney. "If this matter goes to trial it will be a very difficult case and consume significant resources." While concluding—incorrectly, as it turned out—that "there is enough evidence to get by an MJOA [motion for judgment of acquittal]," the memo described the chances of convicting Moore, Reedy, and REI as "questionable." As to Moore specifically, the two Assistant United States Attorneys observed:

> [N]one of the evidence shows direct knowledge by Moore of the payments to Voss through GAI. Even when the evidence is considered in light of Moore's close association with Reedy—from which one can infer that Moore knew of at least some of Reedy's conversations with Gnau—it proves no more than that Moore *probably* knew of the payments to Voss.

True enough, Joseph Valder, the AUSA handling the investigation, disagreed with the memo, stating in a response that "hundreds, if not thousands, of pieces of direct evidence . . . show that the defendants are

guilty beyond a reasonable doubt." Nevertheless, the opinion of the Chief and Deputy Chief of Special Prosecutions—two experienced prosecutors—that the evidence was "questionable" adds weight to Moore's assertion that unbiased officials would never have pressed charges against him.

The record also suggests that unusual prodding from the Postal Inspection Service contributed to the eventual decision to indict—an inference that could, again, support Moore's theory of retaliatory motive. The Chief Postal Inspector, C.R. Clauson, twice wrote to the U.S. Attorney, Jay Stephens, urging him to press charges against Moore, Reedy, and REI. In the second letter, which followed the AUSAs' memorandum, Clauson wrote, "Frankly, Jay, I am disappointed by your office's failure to act on this matter and the series of broken promises from your staff (review committee) relative to the date and nature of their recommendation." Both Clauson and another inspector (one of the defendants in this case) said in their depositions that they were unable to recall the Postal Inspection Service ever sending a similar letter.

Moreover, some record evidence could lead a reasonable trier of fact to conclude that when the U.S. Attorney's Office finally decided to indict, the inspectors behaved before the grand jury as if their case needed bolstering. For example, when Robert Bray, an REI Vice President, wanted to explain in his grand jury statement that to his knowledge Moore and Reedy knew nothing about the payoffs, Valder and the inspectors refused to let him say any such thing, despite protracted negotiations with Bray's lawyer. Valder apparently circled portions of Bray's draft statement and wrote "don't reveal." The record also suggests that

the inspectors and Valder showed the prepared grand jury statements to Spartin during his polygraph examination, and that they shared investigative materials—allegedly including grand jury evidence—with Bolger's ousted successor as PMG, Paul Carlin.

Considering all this evidence together and interpreting it in Moore's favor, we cannot conclude that the postal inspectors would have prosecuted Moore had they not been irked by his aggressive lobbying against Zip + 4. The evidence of retaliatory motive comes close to the proverbial smoking gun: in addition to subpoenas targeting expressive activity, Moore has produced not one, but two Postal Inspection Service documents specifically referring to his lobbying as a rationale for prosecution. At the same time, evidence of guilt seems quite weak: not only did none of the admitted conspirators implicate Moore, but even the U.S. Attorney's Office concluded that, at best, Moore "probably" knew about the charged conspiracies, and even that conclusion rested on the assumption that Reedy likely shared with Moore his misgivings about Gnau and Voss—an assumption the record fails to substantiate. Moreover, the U.S. Attorney's Office warned that the case would be "complicated" and "consume significant resources"—considerations that, under normal circumstances, might weigh against prosecuting a marginal case. Applying the *Haynesworth* test, we believe this combination of factors—complexity and expense plus strong indications of retaliation and weak evidence of probable cause—suggests not only that hostility to free expression was at least a motivating factor in Moore's prosecution, but also that the inspectors may be unable to rebut that inference. Accordingly, Moore has alleged the violation of a constitutional right, precluding sum-

mary judgment under the first element of the qualified immunity test.

Was the Law Clearly Established?

As to the qualified immunity test's second element, *Haynesworth* again stands as the key authority. Decided in 1987, a year before Moore's indictment, *Haynesworth* clearly stated the elements of retaliatory prosecution, leaving no doubt that government officials could be liable for pressing charges they would not have pursued without bad motive. Our conclusion, then, that the inspectors' conduct was actionable under *Haynesworth* constrains us to hold that Moore has alleged the violation of a clearly established right.

The inspectors' argument to the contrary misapprehends the standard for clear law. True, *Haynesworth* stated the elements of retaliatory prosecution "without analysis in a footnote in an opinion generally addressing other issues." (Reply Br. at 12.) But as we noted earlier, *Haynesworth*'s description of the elements was part of its holding, and hence binding precedent, even if it appeared in a footnote. In any event, qualified immunity requires only that the law be clear, not that it be stated prominently or elaborately. Here, *Haynesworth* established the elements of retaliatory prosecution, making plain that what the inspectors were doing—prosecuting a case they otherwise would have left alone—violated the First Amendment. *See Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039; *Butera*, 235 F.3d at 646. Neither *Haynesworth*'s purported lack of analysis nor its use of a footnote freed the Postal Service from the obligation to take note of the opinion and instruct its inspectors accordingly.

Nor did the decisions of other courts give the government reason to doubt that *Haynesworth* meant what it said. The law of other circuits may be relevant to qualified immunity, but only in the event that no cases of "controlling authority" exist in the jurisdiction where the challenged action occurred. *See Wilson*, 526 U.S. at 617, 119 S. Ct. at 1700. Here, a decision of this court—*Haynesworth*—provided guidance on exactly the issue the inspectors confronted. Moreover, even if cases from other jurisdictions could somehow infuse *Haynesworth* with ambiguity, they did not do so before 1988, for nearly all decisions on which the inspectors rely came later. At the time of Moore's indictment, only the Third Circuit required lack of probable cause, *see Losch v. Borough of Parkesburg*, 736 F.2d 903, 906-09 (3d Cir. 1984), although the Eleventh Circuit had hinted at such a requirement in *Motes v. Myers*, 810 F.2d 1055, 1060 (11th Cir. 1987); *see also Redd*, 140 F.3d at 1383. In contrast, and also at the time of Moore's indictment, the Fifth Circuit, though later embracing the Third Circuit's view, *see Keenan*, 290 F.3d at 260, had stated that an enforcement practice could be unconstitutional "if those who file such charges upon probable cause can be presumed to be motivated by a retributive purpose," *Gates v. City of Dallas*, 729 F.2d 343, 346 (5th Cir. 1984); *cf. Izen v. Catalina*, 382 F.3d 566, 571-72 (5th Cir. 2004) (holding that although "the government need not have even reasonable suspicion to undertake an investigation," an investigation undertaken "with the substantial motivation of retaliating" against protected speech may violate the First Amendment). Against this ambiguous background—at best, two circuits immunizing prosecutions based on probable cause and one apparently not—Postal Service officials could not rea-

sonably have read *Haynesworth* to require lack of probable cause.

To sum up, because *Haynesworth*'s framework for Moore's claim is incompatible with the probable cause-based standard the inspectors advocate, we conclude that the Postal Service had, as the Supreme Court put it in *Hope*, 536 U.S. at 741, 122 S. Ct. at 2516, "fair warning" that government officers could be liable under the circumstances alleged here. Agreeing with the district court, we therefore reject the inspectors' claim of qualified immunity.

IV.

Some fifteen years after the district court dismissed the indictment and found evidence probative of Moore's innocence and thirteen years after Moore filed his first complaint, Moore's attorney quipped at oral argument: "I suppose I'd be the poster boy that a lawyer has to be crazy to take a *Bivens* case because you die before it ends." We trust this opinion will reassure *both* sides—Moore and the postal inspectors—that this case may now be resolved within the lifetime of their attorneys. With the inspectors' immunity theory dispatched, nothing stands in the way of a judgment on the merits; indeed, because the district court found material issues of fact in the record, the next step, presumably, will be preparation for trial. We affirm the decision of the district court and remand the case for further proceedings consistent with this opinion.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2288 (RMU)

WILLIAM G. MOORE, JR., ET AL., PLAINTIFFS

v.

MICHAEL HARTMAN ET AL., DEFENDANTS

Aug. 30, 2004

MEMORANDUM OPINION

URBINA, District Judge.

DENYING THE DEFENDANT'S MOTION FOR A RULING; DENYING THE DEFENDANT'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

This matter comes before the court on the defendant United States' motion for a ruling on its motion to strike and for reconsideration of Judge Norma Holloway Johnson's August 5, 2003 order denying summary judgment to the United States.[1] The defendant argues that Judge Johnson "inadvertently" failed to rule on the defendant's motion to strike the plaintiff's statement of disputed material facts prior to denying the defendant's motion for summary judgment. The plaintiff responds

[1] The Calendar Committee for the United States District Court for the District of Columbia reassigned the case to this court in November 2003.

that Judge Johnson impliedly denied the motion to strike by denying the defendant's motion for summary judgment. Furthermore, the plaintiff argues that the defendant's request for reconsideration of Judge Johnson's order is a transparent attempt to reargue points in this court that the defendant already lost in front of Judge Johnson. For the reasons that follow, the court denies the motion for a ruling and denies the motion for reconsideration.

II. BACKGROUND

The facts of the underlying case are set forth in numerous prior opinions and the court will not recount them in great detail here. *E.g., Moore v. United States*, 213 F.3d 705 (D.C. Cir. 2000); *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995). In 1989, after a district court found insufficient evidence to support a reasonable inference that Mr. Moore ("the plaintiff") was aware of a scheme to defraud and steal from the United States Postal Service, the plaintiff brought separate *Bivens*[2] and Federal Tort Claims Act ("FTCA") claims in the Northern District of Texas against, *inter alia*, the Assistant United States Attorney ("AUSA") who had just prosecuted him and the Postal Inspectors who had assisted in the case. *Valder*, 65 F.3d at 191. The federal court in Texas dismissed the *Bivens* claims against the AUSA and transferred both cases to this district, where Judge Johnson consolidated the cases for all future purposes. *Id.* at 192.

Years of litigation have whittled down the plaintiff's original cases to (1) a *Bivens* claim against the Postal Inspectors now on interlocutory appeal on the issue of

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[2] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

qualified immunity, and (2) a claim against the Postal Inspectors under the FTCA for malicious prosecution. *See* Joint Status Report (Mar. 8, 2004) at 2. The court today addresses the latter claim, on which Judge Johnson found a sufficient dispute of material facts to deny the defendant's motion for summary judgment.[3] *Id.* at 6. Normally the court would be proceeding to trial in this case, but the defendant has asked for a ruling on its motion to strike the statement of disputed material facts that the plaintiff filed prior to Judge Johnson's decision.[4] As the defendant argues, Judge Johnson's "by all indications inadvertent" oversight in ruling on the motion for summary judgment without addressing the motion to strike was "highly prejudicial to the United States in this litigation." Def.'s Mot. for Ruling on Mot. to Strike and for Reconsid. ("Def.'s Mot.") at 10. Of course, what the defendant is really concerned about is not whether plaintiff complied with the local rules. "If the [c]ourt considers and grants the

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[3] Judge Johnson held that, "[u]pon consideration of the motion of the defendants, United States, and Michael Hartman, et al., for summary judgment and the response thereto, the Motion for Summary Judgment is DENIED. There are material facts in dispute. The most significant are the facts surrounding the presentation of evidence to the grand jury and the disclosure of grand jury testimony to a key prosecution witness." Order (Aug. 5, 2003).

[4] The plaintiff submitted this statement of material facts pursuant to Local Rule 7.1(h), now Rule 7(h). "Rule 7.1(h) requires a party moving for summary judgment to provide a statement identifying the undisputed facts that entitle it to judgment as a matter of law, and directs the nonmoving party to respond with a statement listing the facts 'as to which it is contended there exists a genuine issue necessary to be litigated.'" *Waterhouse v. District of Columbia*, 298 F.3d 989, 991 n.2 (D.C. Cir. 2002) (quoting LCvR 7.1(h)).

United States' motion to strike, justice requires that the Order denying summary judgment be reconsidered." *Id.* The defendant, in short, would like the court to reconsider the government's motion for summary judgment.

III. ANALYSIS

A. The Court Denies the Defendant's Motion for a Ruling

The defendant's request for a ruling on the motion to strike cannot be addressed without determining whether Judge Johnson's order impliedly resolved that motion. The defendant argues in its motion to strike that the plaintiff's "lengthy [Rule 7.1(h)] statements are so laced with irrelevancies, rhetoric and legal conclusion that it is impossible to discern from them what [the plaintiff] thinks are the material facts genuinely in dispute." Def.'s Mot. to Strike at 6. The plaintiff objects to this characterization, stating that he "methodically responded to each of the more than 135 paragraphs set forth in the statements accompanying [the defendant's] motions for summary judgment with specific factual contentions supported by record citations." Pl.'s Opp'n to Mot. to Strike at 2.

Both parties now dispute whether the plaintiff's statement of disputed facts violated Local Rule 7(h). Much of the defendant's argument ignores the purpose of Rule 7(h), however, which is to "assist[ ] the district court to maintain docket control and to decide motions for summary judgment efficiently and effectively." *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150 (D.C. Cir. 1996). As the court in *Jackson* indicated, Rule 7(h) exists to help the judge; it "places the burden on the parties and their

counsel, who are most familiar with the litigation and the record, to crystallize for the district court the material facts and relevant portions of the record." *Id.* at 151. Once a court rules on a motion for summary judgment, however, Rule 7(h) has largely served its purpose. Moreover, if the parties disagree over a Rule 7(h) submission, the court will presumably have before it the briefing on that disagreement, as did Judge Johnson for more than a year before she ruled on the summary judgment motion.

Because the summary judgment stage of this case is now over, the court is reluctant to revisit a motion regarding a rule designed to facilitate the adjudication of summary judgment. If the defendant had brought to this court's attention a misrepresentation in the plaintiff's Rule 7(h) statement on which Judge Johnson expressly relied, the court would have cause to address the matter. But the defendant brings nothing to this court's attention that it did not bring to Judge Johnson's attention in its motion to strike, except for speculation that Judge Johnson, "having been pressed by Moore to swiftly rule on summary judgment, inadvertently did not consider the pending motion to strike." Reply at 2.

The court therefore declines the defendant's invitation to speculate how Judge Johnson arrived at her holding. *Cf.* Def.'s Mem. at 8-10. The court believes that Judge Johnson was fully briefed on the defendant's arguments concerning the plaintiff's Rule 7(h) submission. The defendant has offered no reason for the court to think otherwise. Accordingly, the court will adhere to the presumption that a ruling inconsistent with an outstanding motion impliedly resolves that

motion.[5] The defendant's motion for a ruling is therefore denied, and the court proceeds to determine whether reconsideration is warranted.

B. The Court Denies the Defendant's Motion for Reconsideration

Judge Johnson's order is interlocutory because it denied a motion for summary judgment and did not dispose of the entire case on the merits. *Johnson v. Jones*, 515 U.S. 304, 307-09, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995). At the outset, the court thus notes that

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[5] *See, e.g., King v. Tecumseh Public Schools*, 229 F.3d 1152, 2000 WL 1256899, *3 (6th Cir. 2000) (Table) (holding that entry of summary judgment while a motion for additional discovery was pending "should be construed as an implicit denial" of the motion for additional discovery); *Moody v. Town of Weymouth*, 805 F.2d 30, 31 (1st Cir. 1986) (holding that the court implicitly denied the plaintiff's motion to strike certain submissions because the court "in its opinion granting defendants' motion to dismiss, relied on defendants' materials"); *Addington v. Farmer's Elevator Mutual Ins. Co.*, 650 F.2d 663, 666 (5th Cir. 1981) (finding that the grant of summary judgment for the defendant "was so inconsistent with the plaintiff's request for leave to amend to state a new claim for relief as implicitly to deny the motion to amend"); *Wimberly v. Clark Controller Co.*, 364 F.2d 225, 227 (6th Cir. 1966) (holding that "[w]hile it is certainly the better practice to specifically rule on all pending motions, the determination of a motion need not always be expressed but may be implied by an entry of an order inconsistent with granting the relief sought"). The defendant attempts to distinguish cases such as these by arguing Judge Johnson's order did not rely on any of the materials in the motion to strike. Reply at 4. As indicated above, however, Local Rule 7(h) facilitates the summary judgment determination. Once that determination is made, an outstanding motion concerning Rule 7(h) becomes less critical absent some extraordinary circumstance not present here. Thus, the court holds that Judge Johnson's order is indeed inconsistent with the motion to strike and that the order therefore impliedly resolved the motion to strike.

Rule 54(b), not Rule 60(b)(6), provides the relevant standard for reconsidering Judge Johnson's order. *See* Fed. R. Civ. P. 54(b) (stating that an interlocutory order on the claims or rights and liabilities of a party "is subject to revision at any time before entry of [final] judgment"). The distinction is important because, although courts only reconsider under Rule 60(b)(6) in "exceptional circumstances," courts have more flexibility in applying Rule 54(b). *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1470 (4th Cir. 1991) (rejecting "vigorously" the lower court's application of the Rule 60 standard to an interlocutory, Rule 54(b) determination).

Furthermore, because Judge Johnson's order is interlocutory, the law of the case doctrine does not automatically apply. *Langevine v. District of Columbia*, 106 F.3d 1018, 1022-23 (D.C. Cir. 1997). That doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)). "[T]he doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions." *Id.*

The inapplicability of the law of the case doctrine theoretically leaves the court with greater discretion to revisit Judge Johnson's order, but this is not to say that district courts should take lightly reconsideration of the orders of their colleagues. As the D.C. Circuit has stated, "[i]nconsistency is the antithesis of the rule of law. For judges, the most basic principle of jurisprudence is that we must act alike in all case of like

nature." *LaShawn v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (noting that the law of the case doctrine helps implement this principle). Thus, although Judge Johnson's order is not "subject to" the law of the case doctrine, *Langevine*, 106 F.3d at 1020,[6] nothing prevents the court from applying the rationales of that doctrine to guide a Rule 54(b) decision. *Virgin Atlantic Airways v. National Mediation Board*, 956 F.2d 1245, 1255 (2d Cir. 1992) (holding that "[e]ven if Rule 54(b) allows parties to request district courts to revisit earlier rulings, the moving party must do so within the strictures of the law of the case doctrine"); *cf. Langevine*, 106 F.3d at 1023-24 (quoting the proposition in Moore's that, in a case where the first judge likely committed clear error, the transfer between judges "should no more freeze prior rulings than it should require their routine reexamination").

Indeed, courts apply a wide variety of tests to determine reconsideration under Rule 54(b).[7] As the Second

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[6] Although failure to adhere to the law of the case doctrine may in some cases constitute abuse of discretion, adherence to the doctrine is not mandatory. *See Messinger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 56 L.Ed. 1152 (1912) (Holmes, J.) (noting that the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power").

[7] *See, e.g., United States v. Jerry*, 487 F.2d 600, 605 (3d Cir. 1973) (interlocutory orders may be reconsidered by a district court when doing so is "consonant with justice"); *M.K. v. Tenet*, 196 F. Supp. 2d 8, 12 (D.D.C. 2001) (holding that "[r]econsideration of an interlocutory decision . . . is available under the standard, 'as justice requires'"); *A & H Sportswear Co., Inc. v. Victoria's Secret Stores, Inc.*, 2001 WL 881718 (E.D. Pa. 2001) (indicating that "[c]ourts tend to grant motions for reconsideration [under Rule 54(b)] sparingly and only upon the grounds traditionally available under Fed. R. Civ. P. 59(e)"); *Gallant v. Telebrands Corp.*, 35

Circuit has noted, "one of the bases for the [law of the case doctrine], the desire to save judicial time, is not too persuasive when, as here, an overruling of our previous decision might well bring 'the case' to a much quicker end than it will otherwise have[.]" *Zdanok v. Glidden Co., Durkee Famous Foods Division*, 327 F.2d 944, 953 (2d Cir. 1964). In this case, a hypothetical scenario in which the court reconsiders Judge Johnson's order and holds in favor of the defendant would obviously further judicial economy because the case would be over. However,

> another consideration is applicable: where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again. Perhaps the "good sense" of [the court's discretion of] . . . comes down to a calculus of the relative unseemliness of a court's

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F. Supp. 2d 378, 394 (D.N.J. 1998) (resolving a Rule 54 motion by determining whether the parties proffer supplemental evidence or new legal theories); *Neal v. Honeywell*, 1996 WL 627616, *2 (N.D. Ill. Oct. 25, 1996) (noting that such motions are "best characterized as a common law motion for reconsideration" and applying a the test of whether the court "has patently misunderstood a party," "has made a decision outside the adversarial issues presented to the Court by the parties," "has made an error not of reasoning but of apprehension," or "a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the Court") (quoting *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990) (dealing with a post-judgment motion to reconsider)); *see generally Motorola, Inc. v. J.B. Rodgers Mechanical Contractors, Inc.*, 215 F.R.D. 581 (D. Ariz. 2003) (surveying various standards). The court additionally notes that is has required litigants to bring motions under Rule 54 "within a reasonable period after an interlocutory order during the pendency of the litigation." *Tax Analysts v. I.R.S.*, 152 F. Supp. 2d 1, 5 n.4 (D.D.C. 2001).

> altering a legal ruling as to the same litigants, with the danger that this may reflect only a change in the membership of the tribunal[.]

Id.

As indicated above, the defendant makes no argument now that it did not make to Judge Johnson. Judge Johnson had ample time to weigh the arguments, oppositions and replies on the motion for summary judgment, the Rule 7.1 submissions and the motion to strike. The only reason to which the plaintiffs can point to further delay this case is that Judge Johnson felt pressured by the plaintiff to rule on a motion and therefore forgot to rule on a motion to strike. Reply at 2. The court finds this argument speculative at best. In light of the "relative unseemliness of a court's altering a legal ruling as to the same litigants," *Zdanok*, 327 F.2d at 953, the court needs greater justification to revisit Judge Johnson's ruling than conjecture about whether she forgot something or felt rushed. Because the defendant fails to offer such justification, its motion for reconsideration is denied.

IV. CONCLUSION

For the foregoing reasons, the court denies the defendant's motion for a ruling and for reconsideration. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 30th day of August, 2004.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-cv-2288 (NHJ) (AK)
[consolidated with No. 93-cv-0324 (NHJ) (AK)]

WILLIAM G. MOORE, ET AL., PLAINTIFFS

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

Aug. 5, 2003

ORDER

Upon consideration of the motion of defendants, United States and Michael Hartman, et al., for summary judgment and the response thereto, the Motion for Summary Judgment is DENIED. There are materials facts in dispute. The most significant are the facts surrounding the presentation of evidence to the grand jury and the disclosure of grand jury testimony to a key prosecution witness.

Accordingly, it is this 5th day of August, 2003,

ORDERED that Defendant's motion for summary judgment be and hereby is denied.

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 99-5197 & 99-5198

WILLIAM G. MOORE, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

WILLIAM G. MOORE, JR., APPELLANT

v.

JOSEPH B. VALDER, APPELLEE

Argued: March 13, 2000
Decided: June 2, 2000

Before: SILBERMAN, RANDOLPH, and ROGERS, Circuit Judges

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

Our first opinion in this case affirmed in part and reversed in part the district court's dismissal of William G. Moore, Jr.'s complaint against a prosecutor and postal inspectors and his complaint against the United States. *See Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995). On remand, the district court again dismissed the claims against the prosecutor, Joseph B. Valder,

and granted judgment on the pleadings in favor of the government, rulings from which Moore now appeals.

I.

Moore's basic grievance is that he was unjustly prosecuted on charges concerning his dealings with the United States Postal Service. In the early 1980s, the company Moore headed—REI—wanted to sell the Postal Service multiple-line scanners, but the Service declined. Moore publicly criticized the decision. A Postal Service governor—Peter Voss—suggested to REI that it hire the consulting firm GAI to promote its product. REI did so. Voss had a side deal with GAI: thirty percent of the fees REI paid to the consulting firm were kicked back to Voss. After their crimes were discovered, Voss and several GAI officials plead guilty. William A. Spartin, GAI's president, negotiated an immunity deal in return for his cooperation.

Postal inspectors and prosecutor Valder, seeking to establish that Moore and REI knew of the kickback scheme, were told instead by each of five of the admitted conspirators, including Spartin, that no one at REI had such knowledge. The postal inspectors later drafted, and the prosecutor presented to the grand jury, "witness statements" for these individuals, but without this exculpatory information. Spartin's refusal to implicate Moore prompted Valder to tear up his immunity agreement and threaten to prosecute Spartin's son. Valder and the postal inspectors showed Spartin the government-drafted statements of the other witnesses. (Moore alleges this disclosure was a violation of grand jury secrecy rules.) Spartin continued to deny that he had personal knowledge of Moore's involvement, repeating the point nineteen

times during a polygraph test. Spartin then said "I have no knowledge of that at all. . . . But, you know, I read that goddam[n] testimony and I'm not a lawyer but Jesus, there's enough there to seem to me to hang REI from the yardarm." Spartin then testified before the grand jury that in his "opinion" Moore knew of the kickback scheme.

Postal inspectors also provided witness interview statements and lab results to Paul Carlin, a former Postmaster General dismissed by the Board of Governors during the scanner controversy. Then, weeks before an indictment was returned against Moore, the inspectors passed along a draft indictment to Carlin. Carlin later filed a civil RICO claim against Moore, alleging that Moore conspired to have the Board dismiss him.

Moore, REI Vice President Robert Reedy, and REI were indicted by a federal grand jury in the District of Columbia in October 1988 for conspiracy to defraud the United States, theft, receipt of stolen property, mail fraud and wire fraud. Despite a court order to turn over even "borderline" *Brady* evidence, Valder failed to provide the defense with exculpatory material, including the Spartin lie detector results and the amended statement of one witness denying any knowledge that REI officials were aware of the kickbacks. The district court granted Moore's motion for judgment of acquittal at the close of the government's case, stating that "[m]uch of what the government characterizes as incriminatory evidence is not persuasive of guilt when viewed in its full context [and] some of the government's evidence is exculpatory and points toward innocent conduct. . . ." *United States v. Recognition Equip., Inc.*, 725 F. Supp. 587, 587-88 (D.D.C. 1989).

Moore then brought his suits against Valder and the postal inspectors under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), and against the United States under the Federal Torts Claims Act (FTCA), *see* 28 U.S.C. §§ 2671-2680. After proceedings unnecessary to recount, the district court dismissed the complaints and Moore appealed. This court considered whether, as the district court determined, Valder enjoyed absolute immunity from civil liability for malicious prosecution and for retaliatory prosecution.[1] *See Moore*, 65 F.3d at 192-95. Relying on the Supreme Court's distinction between a prosecutor's role as an advocate and his conduct as an investigator, *see Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991), *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993), the court decided that absolute immunity shielded some, but not all, of Valder's conduct. Absolute immunity protected Valder from liability for his "decision to prosecute Moore," "for allegedly concealing exculpatory evidence from the grand jury," "for allegedly manipulating evidence before the grand jury to create a false impression of what Moore knew about the alleged fraudulent schemes," and for failing to disclose exculpatory material before trial. 65 F.3d at 194. But absolute immunity did not apply to Valder's "[i]ntimidating and coercing witnesses into changing their testimony" or "disclosing grand jury information to unauthorized third parties." *Id.* at 194-95.

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[1] Moore did not appeal the dismissal of his other *Bivens* claims. *See* 65 F.3d at 191 n.3.

With respect to Moore's claims under the Federal Tort Claims Act, the court took note of the FTCA's "discretionary function" exception, which protects the government from liability for "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government. . . ." 28 U.S.C. § 2680(a). The following alleged conduct fell within the exception: "Deciding whether to prosecute, assessing a witness's credibility to ensure that he is giving an accurate and complete account of what he knows, identifying the evidence to submit to the grand jury and determining whether information is 'exculpatory' and 'material' and therefore must be disclosed pursuant to a *Brady* request." 65 F.3d at 197. "Disclosing grand jury testimony to unauthorized third parties, however, is *not* a discretionary activity nor is it inextricably tied to matters requiring the exercise of discretion." *Id.*

On remand, Valder moved for summary judgment on the retaliatory prosecution claim, contending that Moore could not make out an essential element—that he brought the prosecution at least in part to retaliate against Moore's First Amendment activity—because absolute immunity protected his decision to prosecute Moore. The district court agreed and granted Valder's motion. *See Moore v. Valder*, No.92CV-2288, memorandum opinion at 17-24 (D.D.C. Feb. 5, 1998) ("mem. op.").

As to the FTCA claims, the district court determined that only one aspect of Moore's complaint survived this court's application of the discretionary function exception—namely, the claim that "AUSA Valder and the Postal Inspectors violated Federal Rule of Criminal

Procedure 6(e)(2) . . . by giving Spartin and former Postmaster General Paul Carlin access to the Grand Jury testimony of other witnesses for the purpose of influencing Spartin's testimony and for the apparent purpose of assisting Carlin, a private plaintiff, to pursue civil litigation. . . ." FTCA Complaint ¶ 26. Moore argued that these two grand jury disclosures were sufficient to make out his malicious prosecution and abuse-of-process claims. Under the FTCA, however, claims of malicious prosecution and abuse of process can only arise from the conduct of "investigative or law enforcement officers of the United States government." *See* 28 U.S.C. § 2680(h). "'[I]nvestigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* Postal inspectors are so empowered, *see* 39 C.F.R. § 233.1, but the district court concluded that federal prosecutors are not, *see* mem. op. at 32 & n.21 (citing *Bernard v. United States*, 25 F.3d 98 (2d Cir. 1994); *Gray v. Bell*, 542 F. Supp. 927, 932 (D.D.C. 1982), *aff'd*, 712 F.2d 490 (D.C. Cir. 1983)). The district court then ruled that the unprotected conduct of the postal inspectors did not establish a malicious prosecution or abuse-of-process claim and granted judgment in favor of the United States under Federal Rule of Civil Procedure 12(c). *See* mem. op. at 32-43.

II.

Two of the elements of a claim of retaliatory prosecution are "first, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct."

Haynesworth v. Miller, 820 F.2d 1245, 1256 n.93 (D.C. Cir. 1987) (quoting *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979)). Moore thinks the ground of the district court's dismissal of his claim—that absolute immunity protected Valder with respect to his decision to prosecute—contravened this court's initial decision, in violation of the mandate. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1393 n.3 (D.C. Cir. 1996) (en banc). The prior opinion did hold that some of Valder's conduct was not protected by absolute immunity and the court did remand the retaliatory prosecution claim. But that opinion said nothing about the elements of such a claim, or whether Moore could succeed on his complaint. Rather than dealing with those subjects, the opinion focused on the type of prosecutorial conduct for which there would be absolute immunity. One such type of conduct, of course, was "the decision to prosecute Moore." 65 F.3d at 192. In his brief for that appeal, Valder had argued that if he had immunity for his prosecutorial decision, then Moore's retaliatory prosecution claim could not go forward. But it is clear to us that the court did not pass judgment on the argument, explicitly or implicitly. It follows that the district court did not contravene the mandate of this court.

According to Moore the district court erred for another reason. As he sees it, his retaliatory prosecution claim is not predicated upon Valder's decision to prosecute him. Just as a police officer can be liable for malicious prosecution as a result of his investigatory conduct leading to the prosecution, so too, Moore contends, should a prosecutor be liable if his investigatory conduct leads to the prosecution. *See infra* Part IIIA. The problem for Moore is that we rejected this very argument in *Dellums v. Powell*, 660 F.2d 802, 805-07

(D.C. Cir. 1981) ("*Dellums II*"). A "prosecutorial official," we ruled, could not be "held liable for causing a prosecution to be brought," despite the fact that *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), extended only qualified immunity to prosecutors acting in an investigatory capacity.[2] 660 F.2d at 806. Moore believes the law has changed since *Dellums II*, but he cites no cases in which a prosecutor has been held liable for malicious or retaliatory prosecution. If a prosecutor cannot be sued for malicious or retaliatory prosecution, Moore asks, why would the Supreme Court continue to devote its time to discerning which prosecutorial actions are protected by absolute immunity and which are not? *See Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993); *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991). The answer is that there are potential causes of actions against prosecutors that do not rely on the decision to prosecute. A violation of the Fourth Amendment is one of the more obvious examples.

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[2] It may seem odd that the only official who could not be held liable for malicious or retaliatory prosecution is the prosecutor. A similar point was made in *Imbler*, to which the Court responded with a quotation: "As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Imbler*, 424 U.S. at 428, 96 S. Ct. 984 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.)).

We therefore will affirm the dismissal of Moore's *Bivens* claim against Valder.[3]

III.

With respect to Moore's FTCA action against the United States for malicious prosecution and abuse of process, "the law of the place where the act or omission occurred" is controlling. 28 U.S.C. § 1346(b). All agree that District of Columbia law must be consulted. *See Tarpeh-Doe v. United States*, 28 F.3d 120, 123 (D.C. Cir. 1994).

A. Malicious Prosecution

Under local law four elements make up the tort of malicious prosecution: (1) the defendant's initiation or procurement of a criminal proceeding against the plaintiff; (2) absence of probable cause for the proceeding; (3) malicious intent on the part of the defendant; and (4) termination of the proceeding in favor of the plaintiff. *See Davis v. Giles*, 769 F.2d 813, 814-15 (D.C. Cir. 1985) (citing RESTATEMENT (SECOND) OF TORTS § 653 (1977)). As the first element indicates, in theory not only the prosecutor who initiates criminal proceedings, but also a person who "procures" a criminal proceeding may be liable for malicious prosecution. *See also* Restatement (Second) of Torts § 653. In fact, those who procure malicious prosecutions are usually the only potential defendants because, as here, prosecutors enjoy absolute immunity. *See* W. PAGE KEETON

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[3] Moore also contends that the district court improperly denied his request for discovery. But a district court may deny discovery requests when additional facts are not necessary to resolve the summary judgment motion. *See White v. Fraternal Order of Police*, 909 F.2d 512, 516-17 (D.C. Cir. 1990) (en banc).

ET AL., PROSSER AND KEETON ON TORTS § 119, at 873 (5th ed. 1984). To succeed in this case, Moore must rely on the procurement component of the first element, focusing on the conduct of the postal inspectors in disclosing grand jury material. The remainder of the postal inspectors' conduct fell within the FTCA's discretionary function exception, *see* 65 F.3d at 197, and none of Valder's conduct can be the basis for a malicious prosecution claim against the government because he is not an investigative or law enforcement officer, *see* 28 U.S.C. § 2680(h).

In order to find that a defendant procured a prosecution, the plaintiff must establish "a chain of causation" linking the defendant's actions with the initiation of criminal proceedings. *Dellums v. Powell*, 566 F.2d 167, 192 (D.C. Cir. 1977) ("*Dellums I*"). Moore's chain consisted of the postal inspectors' releasing of grand jury testimony to Spartin, which caused Spartin to incriminate him, which led to his indictment and then his prosecution.[4] *See* mem. op. at 36; FTCA Complaint ¶ 26.

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[4] In his brief, Moore stated only that Valder disclosed grand jury material to Spartin, though he mentions that the inspectors were present at the time. *See* Brief for Appellant at 10. The government jumps on this to argue that Moore's claim had to be dismissed because a malicious prosecution claim under the FTCA can rely only on the conduct of investigative or law enforcement officers and Valder is not one. Moore's complaint, however, alleged that "AUSA Valder *and the Postal Inspectors* violated Federal Rule of Criminal Procedure 6(e)(2) . . . by giving Spartin and former Postmaster General Carlin access to the Grand Jury testimony of other witnesses. . . ." FTCA Complaint ¶ 26 (italics added). We therefore assume that the postal inspectors did play a role in presenting grand jury materials to Spartin.

It may be helpful at this point to look more closely at *Dellums I* and the chain of causation there held sufficient to establish procurement of a prosecution. Plaintiffs had won a verdict against Powell, the D.C. Police Chief, for his role in bringing about criminal charges against anti-war demonstrators. *See* 566 F.2d at 173-75, 193. The court noted that the "chain of causation" would have been broken if the decision to prosecute was "independent of any pressure or influence exerted by Powell and of any knowing misstatements which Powell may have made" to the prosecutors. *Id.* at 192-93. But Powell had knowingly misled the prosecutors when he failed to disclose the fact that the demonstrators were "peaceful" and "not that disorderly." *Id.* at 193. This was sufficient evidence "from which the jury could have concluded that Chief Powell had procured the filing of informations. . . ."[5] *Id.*

We see two distinctions between Moore's case and *Dellums I*. The first is that the postal inspectors themselves did not make the misrepresentations, but allegedly caused Spartin to make them. The district court did not rely on this distinction and we think its effect is only to require Moore to prove an additional link: but for the postal inspectors' disclosure of grand jury testimony to Spartin, he would not have implicated Moore before the grand jury. *See* KEETON ET AL. § 119, at 873 (stating that significant "second-hand" involvement in instigating a prosecution is sufficient).

The second distinction is that the misleading information was presented to the grand jury. The district court made much of this: "Moore has alleged only that the

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[5] The court ordered a new trial, however, because of improper jury instructions. *See id.*

postal inspectors influenced the grand jury's decision to indict . . . Moore's allegations ignore the fact that malicious prosecution requires the initiation of a prosecution by the Executive Branch, not the grand jury. Even if this Court could determine that Spartin's testimony 'caused' the indictment, this would not satisfy the first element because a grand jury indictment cannot by itself initiate a prosecution." Mem. op. at 36-37 (footnotes omitted). We do not believe this accurately reflects District of Columbia law set forth in *Davis v. Giles*. A criminal proceeding is a prerequisite to the malicious prosecution tort. If the proceeding starts with a grand jury indictment and the defendant procured the indictment, the first element of the tort is satisfied. When "an indictment is found by a grand jury . . . the return of the indictment . . . marks the institution of the proceedings." RESTATEMENT (SECOND) OF TORTS § 654 cmt. c; *see* KEETON ET AL. § 119, at 871-72 ("The initial step is of course a matter of the procedure of the particular jurisdiction; and where prosecution is begun by an indictment, or an information filed by the prosecuting attorney, it seems clear that this should be enough, since it constitutes official action and sets the law in motion.").

The government argues that because later actions—the presentation of evidence to the grand jury, for instance—were protected, Moore's case collapses. The district court seemed to agree. *See* mem. op. at 37. If this were enough to break the chain of causation, if the "discretionary function" of presenting evidence to the grand jury or prosecuting the plaintiff shielded prior misconduct from liability, a plaintiff would never be able to make out a malicious prosecution claim against the government. Yet the FTCA specifically recognizes

the tort of malicious prosecution. *See* 28 U.S.C. § 2680(h). We think it follows that although a plaintiff may not rely on an official's alleged misconduct during the exercise of discretionary functions, this does not immunize earlier, unprotected misconduct from ordinary principles of tort liability. *Cf. Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988); RESTATEMENT (SECOND) OF TORTS § 653 cmt. g.

For similar reasons we disagree with the district court that Valder's continuation of the prosecution after the indictment came down constituted an independent act that broke the causal chain. *See* mem. op. at 37. Without the indictment the prosecution could not have continued. *See* FED. R. CRIM. P. 7(a). As we have said, if a prosecutor's continuation of a prosecution automatically immunizes prior steps in the prosecution, then the whole notion of liability for maliciously "procuring" a prosecution would disappear. "[A] prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial—none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision." *Jones v. City of Chicago*, 856 F.2d at 994 (citing, among other cases, *Dellums I*, 566 F.2d at 192-94); *accord* RESTATEMENT (SECOND) OF TORTS § 653 cmt. g. On the other hand, if Moore would have been indicted and prosecuted anyway, even without the postal inspectors' alleged misconduct and Spartin's testimony, then the United States cannot be held liable. *See Jones*, 856 F.2d at 993. Since the case is still at the pleading stage, there is no telling how the evidence will turn out. All that concerns us now is that the complaint sufficiently set forth

the first element of the malicious prosecution tort. *See Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000).

B. Abuse of Process

Under District of Columbia law, abuse of process occurs when "process has been used to accomplish some end which is without the regular purview of the process, or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be required to do." *Jacobson v. Thrifty Paper Boxes, Inc.*, 230 A.2d 710, 711 (D.C. 1967) (citing 1 AM. JUR. 2D *Abuse of Process* § 4 (1962)). Local courts have emphasized that "[t]he critical concern in abuse of process cases is whether process was used to accomplish an end unintended by law. . . ." *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980); *accord Bown v. Hamilton*, 601 A.2d 1074, 1079 (D.C. 1992); *see also Heck v. Humphrey*, 512 U.S. 477, 486 n. 5, 114 S. Ct. 2364, 129 L. Ed .2d 383 (1994); *Scott v. District of Columbia*, 101 F.3d 748, 755 (D.C. Cir. 1997) ("The essence of the tort of abuse of process is the use of the legal system 'to accomplish some end which is without the regular purview of the process. . . .' "(quoting *Bown v. Hamilton*, 601 A.2d 1074, 1079 (D.C. 1992))). The Restatement also focuses on this element of the tort: "For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended." RESTATEMENT (SECOND) OF TORTS § 682 cmt. b.

Moore's complaint failed to allege this critical element of the abuse-of-process tort and, for this reason, the district court properly rendered a judgment on the pleadings in favor of the government. The only paragraph in the complaint dealing with this tort alleged the

following: "AUSA Valder and the Postal Inspectors violated Federal Rule of Criminal Procedure 6(e)(2), which protects the secrecy of Grand Jury proceedings, by giving Spartin and former Postmaster General Carlin access to the Grand Jury testimony of other witnesses for the purpose of influencing Spartin's testimony and for the apparent purpose of assisting Carlin, a private plaintiff, to pursue civil litigation in connection with his dismissal from the Postal Service. The Postal Inspectors even gave Carlin a copy of a draft indictment for his review." FTCA Complaint ¶ 26. As Moore sees it, his allegations regarding Carlin are sufficient to make out a cause of action. But nothing in paragraph 26 of the complaint speaks of *using* the grand jury process for the purpose, immediate or otherwise, of obtaining evidence to assist Carlin in bringing a civil suit. The paragraph alleges only that the postal inspectors disclosed witness testimony and the draft indictment to Carlin.[6] Disclosing information is a far cry from *using* the grand jury to assist Carlin's civil litigation. If the complaint is true, the postal inspectors violated the secrecy of the grand jury. But that does not, in itself, constitute abuse of process. The "process" here is the grand jury and the tort is made out only if the grand jury is misused. Because Moore does not allege the "critical concern" of abuse-of-process law—

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[6] Given that the indictment became public, we do not see how letting Carlin look at the draft could have damaged Moore unless the draft contained information omitted from the final version. We shall assume that the draft contained such information and that it was grand jury material.

that the inspectors *used* the grand jury for an improper purpose—we affirm the judgment of the district court.[7]

Affirmed in part and reversed in part.

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[7] We recognize that on Rule 12(c) motions "[w]e 'view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party.'" *Peters v. National R.R. Passenger Corp.*, 966 F.2d 1483, 1485 (D.C. Cir. 1992) (quoting *Jablonski v. Pan American World Airways, Inc.*, 863 F.2d 289, 290-91 (3d Cir. 1988)). Even if we were to stretch this principle beyond its ordinary confines and infer that the postal inspectors somehow used the grand jury process for the purpose of obtaining evidence that they passed along to Carlin, Moore still could not make out an abuse-of-process claim. For one thing, Moore cannot base his abuse-of-process claim on the presentation of evidence to the grand jury—that is a discretionary function immune from suit under the FTCA. *See Moore*, 65 F.3d at 197; *see also Doe v. Stephens*, 851 F.2d 1457, 1462-63 (D.C. Cir. 1988) (causing a grand jury subpoena to issue falls within discretionary function exception). For another, prosecutors, not postal inspectors, convene and conduct grand jury proceedings—and the actions of a prosecutor cannot give rise to an abuse-of-process claim under the FTCA. *See* mem. op. at 32 & n.21 (citing 28 U.S.C. § 2680(h)).

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2288 (NHJ)
(Consolidated with Civil No. 93CV0324 (NHJ))

WILLIAM G. MOORE, JR., PLAINTIFF

v.

JOSEH B. VALDER, ET AL., DEFENDANTS

Civil Action No. 93-0324 (NHJ)
(Consolidated with Civil No. 92CV2288 (NHJ))

WILLIAM G. MOORE, JR., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Feb. 5, 1998

MEMORANDUM OPINION

This case arises from the federal prosecution of William G. Moore Jr. ("Moore") on charges of fraud, bribery, and conspiracy, of which Moore was acquitted, see *United States v. Recognition Equipment Inc.*, 725 F. Supp. 587 (D.D.C. 1989), and Moore's *Bivens*[1] and

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[1] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

Federal Tort Claims Act ("FTCA")[2] claims for retaliatory prosecution, malicious prosecution, and abuse of process against Assistant United States Attorney Joseph Valder ("Valder"), six United States Postal Service Inspectors ("postal inspectors"), and the United States. Presently before the Court are the following motions: 1) defendant Postal Inspectors' Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement; 2) defendant Valder's Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement; 3) defendant Valder's Motion for Summary Judgment; 4) plaintiff's Motion to Clarify the Stay Order of September 16, 1996, asking whether it applies to Valder; 5) defendant Postal Inspectors' Motion for Summary Judgment; and 6) defendant United States' Motion for Judgment on the Pleadings or, in the Alternative, to Dismiss for Lack of Subject Matter Jurisdiction. The Court will address the motions in this order in light of the Court of Appeals' opinion in this case, *Moore* v. *Valder*, 65 F.3d 189 (D.C. Cir. 1995), cert. denied, 117 S. Ct. 75 (1996).

I. BACKGROUND

A. *The Facts*

As the United States Court of Appeals for the District of Columbia Circuit fully discussed Moore's claims in its opinion, *see Moore*, 65 F.3d at 191-92, the allegations in Moore's complaint and other submissions relevant to the pending motions are summarized as follows.

On October 6, 1988, plaintiff Moore was indicted for allegedly conspiring to bribe a member of the Board of

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[2] 28 U.S.C. §§ 2671 et seq.

Governors of the United States Postal Service ("USPS") in order to procure business for Recognition Equipment, Inc. ("REI"). Moore was Chairman, President, and Chief Executive Officer of REI at the time. Moore and Robert Reedy, another REI employee, were charged with participating in a kickback scheme in which a consulting firm, Gnau & Associates, Inc. ("GAI"), paid kickbacks to Peter E. Voss, a member of the Board of Governors of USPS, in exchange for his encouraging USPS business for GAI's clients, including REI. *See United States* v. *Recognition Equip., Inc.*, 725 F. Supp. 587, 589 (D.D.C. 1989). Five co-conspirators in the scheme, Peter Voss, John Gnau, Michael Marcus, Sharon Peterson, and William Spartin, pled guilty or testified pursuant to a grant of immunity. On November 20, 1989, Moore was acquitted of all charges. *See id.*

Two years later, on November 19, 1991, Moore commenced a *Bivens* cause of action for malicious prosecution (malicious prosecution claim) and one for prosecution in retaliation for the exercise of his First Amendment rights (retaliatory prosecution claim) against Valder and six postal inspectors. *See Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The six postal inspectors are Frank Korman, Michael Hartman, Robert Edwards, Norman Robbins, Pierce McIntosh, and Daniel Harrington. Robbins and McIntosh have since retired, and Harrington has since died. Moore alleges that Valder and the postal inspectors conspired to prosecute him with malicious intent and/or in retaliation for public criticism of USPS.

The Court finds that Moore did engage in public criticism of USPS prior to his indictment and prosecu-

tion by Valder and that his conduct is constitutionally protected by the First Amendment.[3] In 1983, former Postmaster General ("PMG") William Bolger announced that USPS would use single-line scanners to identify addresses on mail instead of the multi-line scanners developed by REI. After this announcement, Moore voiced his criticism of USPS to Bolger, Assistant PMG James Jellison, the media, and members of the United States Congress. In 1985, Moore, Reedy, and REI lobbied to have Jellison and Bolger's successor as PMG, Paul N. Carlin, dismissed from USPS because of their opposition to REI's multi-line technology. That same year, USPS began investigating REI for alleged irregularities in the procurement processes of USPS.

Moore claims that this investigation and his subsequent indictment and prosecution in 1988 and 1989 were brought in retaliation for his public criticism of USPS and its management. Valder and the postal inspectors allegedly coerced witnesses into incriminating Moore by using intimidation tactics and by disclosing secret grand jury information to them. Specifically, Moore claims that defendants coerced William Spartin, the president of GAI, into implicating Moore during his grand jury testimony. Spartin had been granted immunity from prosecution in exchange for his grand jury testimony. During a polygraph examination conducted by postal inspector Norman Robbins on December 5, 1986, Spartin stated nineteen times that he had no personal knowledge that Moore and REI knew of the kickback scheme. Moore claims that in

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[3] The Court makes this finding and other findings of fact in this opinion on the basis of its decision regarding the postal inspectors' and Valder's motions to strike Moore's amended affidavit and Local Rule 108(h) statement. *See supra* pp. 10-17.

order to coerce Spartin into implicating him, Valder and the postal inspectors tore up Spartin's immunity letter in front of him, threatened to prosecute his son, and showed him the grand jury statements of four co-conspirators.[4] These statements were allegedly drafted by Valder and the postal inspectors and indicated that REI and Moore had knowledge of the illegal payoffs.

At Moore's criminal trial, Valder admitted that he gave Spartin government-authored statements of the four other unindicted conspirators that had been adopted as part of the grand jury testimony. See Trial Tr. at 2553-54, 2561. He also admitted in his Answer to Moore's *Bivens* Complaint that a preplanned tearing up of Spartin's immunity letter did occur. *See* Valder's Answer at ¶ 21. On the basis of the evidence before it, the Court finds that Valder and the postal inspectors tore up Spartin's immunity letter, disclosed grand jury statements to him, and in some way threatened his son. The Court also finds that this conduct influenced Spartin's statement to the grand jury that in his "opinion," Moore had to have known about the illegal payoffs. The Court notes that none of Spartin's earlier statements indicating that Moore had no knowledge of the illegal scheme were ever presented to the grand jury.

Moore alleges that Valder and the postal inspectors also coerced Frank Bray, REI's Manager of Postal Programs, into changing his testimony to implicate Moore. Bray, like Spartin, had been granted immunity in exchange for his testimony to the grand jury. During interviews, Bray repeatedly told Valder and the postal

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[4] The statements came from Voss, Peterson, Marcus, and Gnau. *See* Trial Transcript 2550-54, 2727-31.

inspectors that Moore had no knowledge of the kickback scheme; nevertheless, they asked him to sign a witness statement indicating that Moore had knowledge. *See* Trial Tr. at 1809-11, 1832-33, 1939. When Bray refused to sign it, Valder told him he would have to testify before the grand jury for five to seven days or "however long it takes." *See id.* at 1824. Bray and his attorney then insisted that a paragraph be added to the witness statement to show that Moore had no knowledge of the scheme. *See id.* at 1833. Valder and the postal inspectors would not permit its inclusion, but agreed to afford Bray an opportunity to testify that Moore did not know of the scheme. *See id.* at 1939, 1943-44. When Bray testified before the grand jury, however, Valder did not allow him to do this. *See id.* at 1944.

Moore has also alleged that postal inspector McIntosh disclosed secret grand jury material to former PMG Paul Carlin in order to help Carlin bring a civil case against REI, Moore, and Reedy for Carlin's dismissal from USPS. Soon after Moore and Reedy were indicted, Carlin brought a $15 million RICA claim against them. Information that the government produced as Jencks material in Moore's criminal case reveals notes of a phone conversation between Carlin and postal inspector McIntosh on December 9, 1986 ("McIntosh Notes"). The McIntosh Notes indicate that Carlin requested and received grand jury information regarding interviews of former PMG Al Casey, Deputy PMG Jackie Strange, and John McKean, chairman of the USPS Board of Governors, and a lab examination. According to Carlin's testimony at Moore's criminal trial, postal inspectors Hartman and Kormann also

reviewed a draft indictment of Moore with Carlin on September 20, 1988. *See* Trial Tr. at 2153-56.

The Court finds on the basis of the McIntosh Notes and Carlin's trial testimony that postal inspectors McIntosh, Hartman, and Kormann disclosed secret grand jury information to Carlin in violation of Federal Rule of Criminal Procedure 6(e). Moore alleges that the purpose of these disclosures was to help Carlin bring a civil case against Moore, Reedy, and REI. On the basis of Moore' evidence, the Court cannot find that this was indeed the postal inspectors' motive, but accepts this allegation as true for purposes of deciding the motion for judgment on the pleadings filed by defendant United States. *See* Fed. R. Civ. P. 12(c). Valder and the postal inspectors' disclosures of grand jury information to Spartin and Carlin and their coercion of witnesses Spartin and Bray constitute the primary facts upon which Moore's remaining *Bivens* and FTCA claims rest.

B. *Procedural History*

In November 1991, Moore filed a complaint in the U.S. District Court for the Northern District of Texas against Valder and the postal inspectors alleging among other torts malicious and retaliatory prosecution under *Bivens*. This case was subsequently transferred to this Court in September 1992. On October 14, 1992, Moore filed a second complaint in the Northern District of Texas against the United States pursuant to the FTCA, 28 U.S.C. §§ 2671 et seq., setting forth claims for malicious prosecution, false arrest, abuse of process, and various constitutional torts. The second case was also transferred to this Court and consolidated with the first case.

The U.S. District Court for the Northern District of Texas dismissed the *Bivens* claim against Valder, finding him protected by absolute immunity. The district court transferred the *Bivens* claims against the postal inspectors to this Court for lack of in personam jurisdiction and transferred the FTCA claim against the United States to this court as well. After denying Moore's motion to return the complaints to the Northern District of Texas, this Court dismissed the *Bivens* claims against the postal inspectors because Moore's complaint failed to meet a heightened pleading standard. This Court also dismissed the FTCA claims against the United States for lack of subject matter jurisdiction, holding that the alleged misconduct fell within the "discretionary function" exception of the FTCA. *See* 28 U.S.C. § 2680(a).

Moore subsequently appealed the dismissals of his claims against Valder, the postal inspectors, and the Untied States to the D.C. Circuit. The D.C. Circuit affirmed some of the dismissals, but remanded some of the claims against Valder, the postal inspectors, and the United States, *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995). These claims had been dismissed under the standard set by Federal Rule of Civil Procedure 12(b)(6).[5] On appeal, the D.C. Circuit "accept[ed] the

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[5] If a plaintiff fails to state a claim upon which relief can be granted, the court must dismiss the claim. *See* Fed. R. Civ. P. 12(b)(6). In deciding a Rule 12(b)(6) motion, the court "may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which we may take judicial notice." *E.E.O.C. v. St. Frances Xavier Parochial School*, 117 F.3d 621, 625 (D.C. Cir. 1997). The "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Kowal v.*

facts alleged in [Moore's] complaint" and reviewed the district court's Rule 12(b)(6) dismissals de novo. *Moore*, 65 F.3d at 192.

The findings of the D.C. Circuit under Rule 12(b)(6) therefore evaluated only the legal sufficiency of Moore's allegations rather than Moore's evidence to support those allegations, which is what this Court must consider when deciding defendants' motions for summary judgment under Federal Rule of Civil Procedure 56.[6] Allegations that can survive a Rule 12(b)(6) motion will not necessarily survive a motion for summary judgment under Rule 56. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689-90 n.15 (1973); *Wilderness Society v. Griles*, 824 F.2d 4, 15 (D.C. Cir. 1987) (noting that "while a motion of dismiss may be decided on the pleadings alone, construed liberally in favor of the plaintiff, a motion for summary judgment by definition entails an opportunity for a supplementation of the record, and accordingly a greater showing is demanded of the plaintiff."). Furthermore, the "heightened pleading standard" applied in the D.C. Circuit's opinion in *Moore v. Valder* was unanimously rejected by the D.C. Circuit in *Crawford-El v. Britton*, 93 F.3d 813, 829 (D.C. Cir. 1996) (en banc), *cert. granted*, 117 S.Ct. 2451 (1997)

MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). Additionally, "[t]he complaint must be 'liberally construed in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged." *Id.* (footnote omitted).

[6] While Rule 12(b)(6) motions are decided on the basis of the pleadings, Rule 56 summary judgment motions are decided on the basis of the pleadings and matters outside of them, such as supporting and opposing affidavits. In this case, the Court will have to consider the parts of Moore's affidavit and Rule 108(h) statement that this Court decides not to strike.

("*Crawford-El II*"). For these reasons, this Court will consider defendants' summary judgment motions in light of the D.C. Circuit's opinion in *Moore* and the standards set by Rule 56 and *Crawford-El II*.

Because Moore's claims rely on *Crawford-El II*, the Court must first describe the holdings of that case. Although there is no question that the D.C. Circuit rejected the "heightened pleading standard" in *Crawford-El II*, the parties dispute whether a majority o the Court of Appeals judges adopted a standard for constitutional tort cases requiring "clear and convincing evidence" of a defendant government official's unconstitutional motive. *Crawford-El II*, 93 F.3d at 821-24. United States Court of Appeals judges who have referenced *Crawford-El II* in their opinions believe the D.C. Circuit has adopted the clear and convincing standard.[7] Three district court judges within the D.C. Circuit have also reached this conclusion.[8]

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[7] *See, e.g., Tang v. State of Rhode Island, Dep't of Elderly Affairs*, 120 F.3d 325, 327 (1st Cir. 1997); *McMillan v. W.E. Johnson*, 101 F.3d 1363, 1368-39 (11th Cir. 1996) (Propst, J., concurring).

[8] *See Byrd v. Moseley*, 942 F. Supp. 642, 645 (D.D.C. 1996) ("In Crawford-El v. Britton, the Court of Appeals for this circuit recently held that a '§ 1983 or *Bivens* plaintiff who seeks damages from a government official for a constitutional tort must prove the defendant's unconstitutional motive (where that is an element of the tort) by clear and convincing evidence' to withstand a motion summary judgment on the grounds of qualified immunity.") (quoting J. Ginsburg's concurrence); *Bridges v. Kelley*, 977 F. Supp. 503, 509 n.11 (D.D.C. 1997) ("Under the rule announced in Crawford-El, plaintiff must adduce clear and convincing evidence of motive on the part of the defendants.") (citation omitted); *District Council 20 v. The District of Columbia*, 1997 WL 446254, at *12-*13 (D.D.C. July 29, 1997) (applying first the "clear and convincing" test to

What is clear from *Crawford-El II* is that "Judge Ginsburg's separate opinion . . . . is controlling on [the issue of discovery] as the opinion consistent with the disposition on the narrowest ground." *Crawford-El II*, 93 F.3d at 829 (citing *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991)). According to Judge Ginsburg, if a plaintiff facing a summary judgment motion cannot establish clear and convincing evidence of the defendant's unconstitutional motive, the motion should be granted unless the plaintiff can show, "based upon such evidence as he may have without the benefit of discovery and any facts to which he can credibly attest," that he has "a reasonable likelihood of turning up evidence that a jury could consider clear and convincing proof of the defendant's unconstitutional motive." *Id*, at 841 (Ginsburg, J. concurring). If the plaintiff can demonstrate this "reasonable likelihood," he should be allowed to pursue "limited discovery." *Id.*

Because Moore's retaliatory prosecution claims against Valder and the postal inspectors constitute motive-based constitutional tort actions, this Court must apply *Crawford-El II* to defendants' summary judgment motions. The Court will apply the case in the following manner. First, the Court will look to see if Moore has "clear and convincing" evidence of defendants' retaliatory motive to withstand their summary judgment motions. If Moore cannot meet this standard, then the Court will apply Judge Ginsburg's standard to determine whether Moore should nonetheless be permitted to pursue limited discovery on the motive issue. Before turning to defendants' dispositive motions, however, the Court will first decide whether to grant

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determine whether summary judgment should be granted and then Judge Ginsburg's test to see if discovery was warranted).

Valder and the postal inspectors' motions to strike Moore's amended affidavit and 108(h) statement.

II. DISCUSSION

A. *Postal Inspectors' and Valder's Motions to Strike Moore's Amended Affidavit and Local Rule 108(h) Statement*

On February 25, 1997, this Court issued an Order striking Moore's affidavit of June 30, 1990, and his Statement of Material Facts as to Which There Exists a Genuine Issue to be Litigated ("108(h) statement") filed in opposition to the Postal Inspectors' Motion for Summary Judgment, because the former did not comply with Federal Rule of Civil Procedure 56(e) and the latter did not comply with Local Rule 108(h). Moore filed an amended 108(h) statement and an amended affidavit in opposition to the postal inspectors' summary judgment motion. Moore subsequently filed the same amended documents in opposition to Valder's summary judgment motion. Both the postal inspectors and Valder have moved to strike the amended affidavits and amended 108(h) statements filed in opposition to their respective motions for summary judgment. As the amended affidavits and 108(h) statements are "in all material respects identical" and allegedly suffer from the same defects,[9] the Court will address the postal inspectors' and Valder's motion to strike simultaneously.

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[9] In his motion to strike Moore's amended affidavit and 108(h) statement, Valder indicated that he joins in the arguments made in the postal inspectors' memoranda supporting their second motion to strike.

The postal inspectors and Valder ask the Court to strike Moore's entire affidavit and the entire 108(h) statement, alleging that significant parts of them do not comport with FRCP 56(e) and Local Rule 108. Although the Court has the discretion to strike Moore's amended affidavit and 108(h) statement in their entirety as it did in its Order of February 25, 1997, the Court finds that Moore made an effort to comply with its Order and it is not necessary to strike the amended submissions altogether. The Court therefore strikes only those portons of the affidavit and 108(h) statement that are inadmisible for the reasons explained below. *See Casas Office Machs., Inc. v. Mita Copystar Am., Inc.*, 42 F.3d 668, 682 (1st Cir. 1994).

The postal inspectors and Valder argue that Moore's amended affidavit contains statements that are not based upon his personal knowledge. Federal Rule of Civil Procedure 56(e) provides in relevant part that:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers thereof references to in an affidavit shall be attached thereto or served therewith.

The postal inspectors and Valder claim that Moore's amended affidavit continues to rely on hearsay statements and factual assertions not bases upon Moore's personal knowledge. Under Rule 56(e), the facts set forth in affidavits submitted in opposition to a summary judgment motion must be "such as would be admissible

in evidence." *Jameson v. Jameson*, 176 F.2d 58, 60 (D.C. Cir. 1949).

Moore argues that the Court should permit hearsay statements in his affidavit and 108(h) statement because formal discovery has yet to take place in this case. He cites a 1991 D.C. Circuit case indicating that "[i]nadmissible hearsay reports of the defendant's *specific* statements indicating malicious intent" can meet the Circuit's heightened pleading standard[10] when discovery has not yet occurred. *See Crawford-El v. Britton*, 951 F.2d 1314, 1320 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 818 (1992) ("*Crawford-El I*"). The heightened pleading standard applied in *Crawford-El I*, however, was replaced with new standards in *Crawford-El II*, as explained above. *See Crawford-El II*, 93 F.3d at 815. Applying the standards of *Crawford-El II*, this Court will not consider hearsay statements in Moore's affidavit or 108(h) statement because such statements are neither "evidence" nor "facts to which he can credibly attest." *Id.* at 841.

Paragraphs 25 and 35 of Moore's Amended Affidavit

In paragraph 25, Moore states: "I was later informed that Mr. Valder and the inspectors characterized my answers as the 'biggest ___ing lies a man can tell.'"

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[10] The heightened pleading standard in *Crawford-El I* "insist[ed] that, before discovery, plaintiffs suing government officers fro damages set forth 'nonconclusory allegations' that are 'sufficiently precise to put defendants on notice of the nature of the claim, and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds." *Id.* at 1317. Because there has been no opportunity for discovery, "the heightened pleading requirement demands only that plaintiff 'relat[e] the pertinent information that is already in his possession.'" *Id.* at 1320 (citation omitted).

Moore openly admits that this assertion is based upon the report of others, not his own personal knowledge. Because the statement constitutes inadmissible hearsay under Federal Rule of Evidence 802, the Court strikes it. In paragraph 35, Moore references assertions made in a trade journal editorial regarding the alleged "hatred" between REI and the top reaches of the Postal Service. Because these assertions are not based on Moore's personal knowledge, but rather on an editorial, they must also be struck for noncompliance with Rule 56 (e). As a result of striking paragraph 35 and Exhibit 3 of Moore's affidavit, the Court also strikes the second sentence of statement 15 in Moore's 108(h) statement, which relies on the affidavit.

Paragraphs 21 and 22 of Moore's Amended Affidavit

In Paragraph 22, Moore states that former PMG William Bolger and Former Assistant PMG James Jellison were "aware of my sharp criticism [of the USPS optical character reading procurement strategy] and that I had taken the matter to Congress." While defendants concede that Moore can testify to another person's state of mind if his testimony were based upon personal observation, they claim that Moore failed to state facts in his affidavit demonstrating that requisite foundation. *See Securities and Exchange Comm'n v. First City Financial Corp., Ltd*, 688 F. Supp. 705, 720 (D. D.C. 1988), *aff'd*, 890 F.2d 1215 (D.C. Cir. 1989); Fed. R. Evid. 602. Moore counters that paragraph 21 shows that he told Bolger of his intent to approach the USPS Board of Governors and the U.S. Congress to stop the single-line ZIP+4 implementation. In the Court's view, paragraph 21 shows that Bolger and Jellison were aware of Moore's criticism and permit the

reasonable inference that they knew he went to Congress. The Court will not strike paragraph 22.

Paragraphs 26, 27, 29, 30, 32, and 39 of Moore's Amended Affidavit

With respect to paragraphs 26, 27, 29, 30, 32, and 39, defendants against contend that they are not based on Moore's personal knowledge, but rather on testimony of others at his trial or on speculation as to why certain allegations were included in his indictment. The Court agrees that Moore lacks personal knowledge of why and how his indictment was prepared and will strike speculative statements in paragraph 26. As for statements in the challenged paragraphs referencing testimony at Moore's criminal trial, Moore must cite the trial transcript to support his 108(h) statement and cannot rely on his own affidavit for such support. Thus, Moore's references to what the Court found in his trial and what Moore "learned" from observing trial testimony must be struck from his affidavit. However, this does not preclude Moore from citing the trial record directly in support of his 108(h) statement, which Moore has done. Thus, although the Court strikes parts of paragraph 26 and all of paragraph 27, 31, and 32 of Moore's affidavit, the Court upholds Moore's citations to the "McIntosh Notes," the Trial Transcripts, and the Spartin Polygraph found in his 108(h) statement.

The Court also finds that paragraphs 29 and 32 are not based on Moore's personal knowledge and therefore strikes them. Both paragraphs contain statements that rely upon the statements of others made at trial or elsewhere. This reliance violates Rule 56(e) because "[p]ersonal knowledge may not be based upon the statements of another." *Securities & Exchange Com-*

mission v. First City Financial Corp., Ltd., 688 F. Supp. 705, 720 (citation omitted), *aff'd*, 890 F.2d 1215 (D.C. Cir. 1989). While Moore can cite information contained in the trial transcript or district court opinion issued in his criminal case[11] to support his 108(h) statement, such information does not constitute his personal knowledge and therefore must be struck from his affidavit.

The Court also strikes paragraph 39 because Moore once again cites the statement of another as is own, this time the affidavit of William C. Hittinger. Moore can cite and has cited the Hittinger Affidavit directly to support statement 28 of his 108(h) statement. The Hittinger Affidavit asserts that AUSA Valder did not care whether Moore was guilty because he needed "a track record and some notoriety which would help him obtain a good position in private practice." Hittinger Affidavit at ¶ 6. According to Hittinger, AUSA Valder said this in his company and that of several postal inspectors, who did not respond to the comment. The Court will consider the Hittinger Affidavit in deciding the summary judgment motions.

Paragraphs 40 and 17 of Moore's Amended Affidavit

In paragraph 40 of his affidavit, Moore attempts to allege evidence of malicious intent on the part of the defendants. Most of the statements this paragraph, however, constitute mere opinion and speculation about the state of mind of the defendants and are not supported by Moore's personal knowledge. For these reasons, the Court strikes all the paragraph 40, except for Moore's personal observations that USPS manage-

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[11] *United States v. Recognition Equipment, Inc.*, 75 F. Supp. 587 (D.D.C. 1989).

ment appeared angered by his criticism of them and that the postal inspectors appeared hostile to him during the USPS investigation of him. Lastly, the Court strikes PMG Bolger's 1982 statement about "bad blood" between USPS and REI referenced in paragraph 17 of Moore's affidavit, because although the statement satisfies the personal knowledge requirement of rule 56(e), the statement constitutes inadmissible hearsay.

Moore's Amended 108(h) Statement

Having struck several paragraphs of Moore's affidavit, the Court now looks to Moore's 108(h) statement. The importance of filing a proper Rule 108(h) statement is well established. *See Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 151 (D.C. Cir. 1996). Strict compliance with the Local Rule is necessary because courts rely upon the statement to distinguish disputed from undisputed facts and to identify the pertinent parts of the record. *Id.*

The Court finds the sections of Moore's 108(h) statement entitled "the Strained Relationship between REI and the USPS" and "The Postal Inspector's Abusive Conduct" to be problematic because they are argumentative and conclusory. A Rule 108(h) statement should be struck when it "blend[s] factual assertion with legal argument." *Id.* at 153. Many instances in these sections of Moore's 108(h) statement characterize, rather than merely assert, material facts. For instance, the word "abusive" in the heading must be struck, as well as statements such as "the postal inspectors employed *improper* techniques" (statement 23), "the Postal Inspectors and . . . Valder also attempted to *coerce* witnesses into false testimony" (statement

24(b)), "[i]n order to *coerce* Spartin into inculpating Moore," and "[i]n order to *trick* Spartin into inculpating Moore" (statement 24(c)). These statements not only use argumentative language but also presume knowledge of the defendants' state of mind, and therefore must be struck. The Court also finds that statement 36[12] is argumentative and therefore strikes it.

Having struck paragraph 17 and most of paragraph 40 of Moore's affidavit, the Court must also strike the parts of statement 16 in the 108(h) statement that rely on such paragraphs. While the Court finds that paragraphs 21 and 22 support a finding that the reationship between REI and the USPS was "strained" during parts of Moore's tenure with REI, the Court strikes the language alleging that the relationship was strained "before" Moore's arrival and "worsened after it." Paragraphs 21 and 22 show merely that Bolger and Jellison knew of Moore's criticism of USPS and appeared "upset" to Moore.

Upon consideration of defendants' motions to strike Moore's amended affidavit and 108(h) statement, memoranda in support and in opposition, and the entire record, the Court grants the motions in part, and denies them in part, as indicated in the paragraphs above. On the basis of what remains of the 108(h) statement and the supporting exhibits, including what is left of Moore's affidavit, the Court will decide whether to grant the summary judgment motions of Valder and the postal inspectors with respect to the *Bivens* claims remanded by the D.C. Circuit. The Court will conclude

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[12] Statement 36 reads: "The Postal Inspectors have not submitted any proof evidencing a legitimate motive for the investigation and indictment of William G. Moore, Jr."

by deciding whether to grant judgment on the pleadings in favor of the United States with respect to Moore's FTCA claims remanded by the D.C. Circuit.

B. *Valder's Summary Judgment Motion With Respect to the Remanded Bivens Claims and Moore's Motion To Clarify Order of September 16, 1996, Staying Discovery*

The United States District Court for the Northern District of Texas found that Valder was protected by absolute immunity from the *Bivens* claims brought against him and granted Valder's motion under Federal Rule of Civil Procedure 12(b)(6). That case was transferred to this Court and on appeal, the D.C. Circuit held that absolute immunity protects Valder from liability for some of his conduct, but not all of it, and remanded part of the case that had been improperly dismissed under Rule 12(b)(6). *See Moore* v. *Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995). The D.C. Circuit held that Valder was not liable for "the decision to prosecute Moore" nor "for allegedly concealing exculpatory evidence from the grand jury and for allegedly manipulating evidence before the grand jury to create a false impression of what Moore knew about the alleged fraudulent schemes." *Id.* Valder, however, does not enjoy absolute immunity for "intimidating and coercing witnesses into changing their testimony" and "disclosing grand jury testimony to unauthorized third parties" because this conduct is not "advocacy." *Id.* at 194-95. The D.C. Circuit noted that Valder is entitled to any qualified immunity available to the postal inspectors." *Id.* at 195 n.8.

The issue for this Court on remand is whether Valder's alleged conduct of coercing witnesses and

disclosing grand jury testimony can establish a *Bivens* claim for retaliatory prosecution.[13] In his motion for summary judgment, Valder first argues that Moore cannot establish an essential element of his claim for retaliatory prosecution because the absolute immunity doctrine protects Valder's decision to prosecute Moore. Valder also argues that the qualified immunity doctrine protects him from any liability arising out of forcing witnesses to change their testimony and unauthorized disclosures of grand jury material. The Court finds the first argument persuasive and therefore does not reach the second. For the reasons given below, the Court will grant Valder's summary judgment motion.

On appeal from the dismissal of Moores claims against Valder, the D.C. Circuit accepted the facts as alleged in Moore's complaint and reviewed the Rule 12(b)(6) dismissal de novo. *See Moore*, 65 F.3d at 192. The findings of the D.C. Circuit under Rule 12(b)(6) standards reflect a different evidentiary basis than that required by Valder's motion for summary judgment under Federal Rule of Civil Procedure 56. Under Rule 12(b)(6), the Court construes the *allegations* in the complaint liberally and draws all inferences therefrom in favor of the plaintiff to see if he or she has stated a claim upon which relief can be granted. *Kowal* v. *MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Under Rule 57, the Court does not accept the complaint as true but rather looks at the plaintiff's *evidence* to see if there is a genuine issue of material fact requiring resolution at trial. *See* FED. R. CIV. P. 56(c)-(e). The D.C. Circuit therefore applied a more

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[13] Moore concedes in his Opposition to Valder's summary judgment motion that the only remaining claim against Valder is one of retaliatory prosecution.

lenient standard than this Court must apply under Rule 56. Additionally, the "heightened pleading standard" applied in the D.C. Circuit's opinion has been unanimously rejected by the D.C. Circuit in *Crawford-El II*, 93 F.3d at 829. To account for these differences, this Court will consider defendants' summary judgment motions in light of the standards set by Rule 56 and *Crawford-El II*, as well as the findings of the D.C. Circuit in *Moore* v. *Valder*, 65 F.3d 189 (D.C. Cir. 1995).

The Court should grant a summary judgment motion whenever the evidence shows that "there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Only a factual dispute that "might affect the outcome of the suit under the governing law" can preclude summary judgment. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party must identify the absence of sufficient evidence on an essential element of the nonmoving party's case. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). The nonmoving party "may not rest upon mere allegations or denial of [his] pleading, but [his] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). If the nonmoving party fails to do this, summary judgment must issue in favor of the moving party. The Court must believe the evidence presented by the nonmoving party and draw all reasonable inferences from it. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 266 (1986). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

Valder argues that he is entitled to summary judgment as a matter of law because Moore cannot make out an essential element of retaliatory prosecution, which is Moore's only remaining claim against him. An essential element of a *Bivens* claim for retaliatory prosecution is that the defendant brought the prosecution in question in order to retaliate against the individual for exercising his First Amendment rights. *See Haynesworth* v. *Miller*, 820 F.2d 1245, 1257 n.93 (D.C. Cir. 1987). To overcome a motion for summary judgment, Moore would have to come forward with clear and convincing evidence from which a reasonable trier of fact could find that Valder brought the prosecution with the purpose of retaliating against Moore for his criticism of USPS. *See Crawford-El II*, 93 F.3d at 829.

According to Valder, he cannot be held liable for retaliatory prosecution because this claim inherently relies on his decision to prosecute Moore, which is absolutely protected by prosecutorial immunity. *See Moore*, 65 F.3d at 194. This holding implies that Moore cannot base any claim for damages on Valder's decision to prosecute Moore. This implication is supported by another D.C. Circuit case, in which the plaintiffs could not bring a malicious prosecution claim against an Attorney General because "instituting a criminal action" was both an essential element of the claim and an absolutely protected activity. *Dellums* v. *Powell*, 660 F.2d 802, 805-06 (D.C. Cir. 1981).[14] Although the D.C. Circuit in *Moore* concluded that coercing witnesses and disclosing grand jury material are not absolutely protected activity, this activity by itself cannot

[14] The Court explained that this holding applied to both malicious prosecution and retaliatory prosecution claims based on the First Amendment. *See Dellums*, 660 F.2d at 806.

satisfy the essential elements of a claim for retaliatory prosecution because that claim requires that Valder caused Moore's prosecution. *See Dellums* v. *Powell*, 566 F.2d 167, 191 n.65 (D.C. Cir. 1977). While Valder did initiate and continue the prosecution of Moore, thereby satisfying one of the elements of retaliatory prosecution, the D.C. Circuit has made clear that liability cannot rest on this conduct. *Moore*, 65 F.3d at 194 ("prosecutorial immunity insulates him from liability for his unquestionably advocatory decision to prosecute Moore"). *See also Dellums*, 660 F.2d at 806 ("[n]ever has a prosecutorial official been held liable for causing a prosecution to be brought").

Because the doctrine of absolute immunity precludes Moore from establishing an essential element of his retaliatory prosecution claim, there is no genuine issue as to any material fact and Valder is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *Celotex*, 477 U.S. at 323.[15] Even if Moore had evidence from which a reasonable trier of fact could find that Valder did coerce witnesses and disclose grand jury material in order to incriminate Moore, this conduct by itself could not constitute retaliatory prosecution until Valder decided to initiate the prosecution of Moore. At that point, however, Valder's conduct became absolutely protected, thereby foreclosing a claim for re-

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[15] The U.S. Supreme Court explained that when a party cannot establish an essential element of her claim, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex*, 477 U.S. at 323.

taliatory prosecution. *See Dellums*, 660 F.3d 806. Moore suffered no injury from Valder's alleged coercion of witnesses and disclosure of grand jury material until the fruits of that conduct were used against him before the grand jury and at trial. Yet, as soon as Valder began deciding what information to present to the grand jury and at trial, his conduct became absolutely protected. *See Moore*, 65 F.3d at 194 ("Valder's decisions regarding what evidence to put before the grand jury, and in what manner, are advocatory because they are central to the prosecutor's task of 'initiating a prosecution' and 'presenting the State's case.'") (citations omitted).

Thus, even though the D.C. Circuit held that some of Valder's conduct was not absolutely protected and remanded that part of the case, what is left of the case cannot meet the elements of a *Bivens* claim for retaliatory prosecution. This situation resembles that in *Buckley* v. *Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994). The United States Supreme Court had remanded parts of the case back to the Seventh Circuit, including Buckley's claim that the prosecutors violated his Due Process rights by coercing two witnesses and paying them money to implicate Buckley in their statements. *See Buckley* v. *Fitzsimmons*, 509 U.S. 259, 279 (1993).[16]

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[16] The Supreme Court found that: "The precise contours of these claims are unclear, and they were not addressed below; we leave them to be passed on in the first instance by the Court of Appeals on remand." *Id.* The Supreme Court also held that the prosecutors' alleged misconduct, when trying to determine whether a bootprint at the scene of the crime had been left by Buckley, was an investigatory rather than a prosecutorial function, entitled to only qualified immunity, and that the prosecutor's allegedly false statements to the press were entitle to only qualified, and not absolute, immunity from Section 1983 liability.

On remand, the Seventh Circuit found that this conduct was not entitled to absolute immunity because the interrogation and payments occurred early in the investigation, before the prosecutors were functioning as advocates. *See Buckley*, 20 F.3d at 794. When the Court proceeded to the question of whether coercing witnesses to incriminate Buckley was entitled to qualified immunity, the Court concluded that such conduct did not violate any clearly established right of Buckley and dismissed the claim based on that conduct. *Id.* at 794-95.

The Court noted that while the prosecutors' coercion could violate the constitutional rights of the *witnesses*, it did not violate Buckley's right and did not give him a claim against the prosecutors. *Id.* at 194-95. The Court explained:

> [I]f the constitutional entitlement is the right to prevent use of the [coerced] confession at trial (or before the grand jury), then absolute immunity under *Imbler* defeats Buckley's claim. *Obtaining* the confessions is not covered by immunity but does not violate any of Buckley's rights; *using* the confession could violate Buckley's rights but would be covered by absolute immunity. Because the "reliability" aspect of coerced-confession law is an element of trial practice . . . the only way Buckley can establish a violation of the Constitution is to plead himself out of court. Prosecutors are entitled to absolute immunity for actions as advocates before the grand jury and at trial even if they present unreliable or wholly fictitious proofs.

Id. at 795 (citations omitted) (emphasis added). For similar reasons, Moore cannot base a retaliatory prose-

cution claim upon Valder's alleged coercion of witnesses and disclosures of grand jury testimony to witnesses without pleading himself out of court. To establish the claim, Moore must show that Valder *used* the witness statements procured through this wrongful conduct in the grand jury and trial proceedings in order to prosecute Moore in retaliation for his criticism of USPS. However, as soon as Moore alleges this, he confronts the absolute immunity doctrine which effectively prohibits his claim.

Finding that absolute prosecutorial immunity precludes Moore from establishing an essential element of a *Bivens* claim for retaliatory prosecution against Valder, the Court does not address the merits of Valder's qualified immunity defense. The Court grants Valder's motion for summary judgment and denies Moore's Motion To Clarify Order of September 16, 1996, Staying Discovery as moot.[17]

C. *The Remanded Bivens Claim of Retaliatory Prosecution Against the Postal Inspectors*

On September 24, 1993, this Court dismissed the *Bivens* claims against the postal inspectors on the grounds that Moore's complaint had not met a heightened pleading standard. On appeal, the D.C. Circuit concluded that this Court should have decided if the

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[17] This Order granted defendant postal inspectors' motion to stay discovery to permit them to file a motion for summary judgment based on the D.C. Circuit's opinion in *Crawford-El II*. Moore's motion asked the Court to clarify whether this Order applied to Valder or whether discovery could proceed on Moore's claims against Valder. In light of the Court's grant of summary judgment in favor of Valder, the issue of whether discovery can proceed against Valder is moot and the motion is thus denied.

Bivens claims alleged violations of clearly established law before it reached the heightened pleading standard issue. *See Moore*, 65 F.3d at 195. The D.C. Circuit then held that it was snot clearly established that malicious prosecution violates any constitutional or statutory right and affirmed the dismissal of Moore's malicious prosecution claim against the postal inspectors. *See id.* at 195-96. However, the Court of Appeals reversed the dismissal of Moore's retaliatory prosecution claim, finding that retaliation for speech protected by the First Amendment violates a clearly established right. It also found that Moore met the Circuit's two-level heightened pleading standard, articulated in *Kartseva* v. *Dep't of State*, 37 F.3d 1524, 1530-31 (D.C. Cir. 1994).[18] *See id.* at 196.

This Court acknowledges the D.C. Circuit's finding that retaliatory prosecution violates a clearly established right, but revisits its finding that Moore met the heightened pleading standard in *Kartseva* in light of intervening D.C. Circuit precedent and the higher evidentiary burden required by Federal Rule of Civil Procedure 56. The two-level heightened pleading standard articulated in *Kartseva* for claims involving

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[18] In *Kartseva*, the D.C. Circuit explained the two levels as follows:

> The first level applies to all *Bivens* or § 1983 claims and demands that plaintiffs plead the facts surrounding the alleged violation with sufficient "detail[] to enable the district court to decide at the outset whether [the] action may proceed to discovery and trial" over a qualified immunity defense. The second level of our heightened pleading standard applies only to claims in which the outcome depends on the defendant's state of mind, and it demands direct evidence of intent.

Kartseva, at 130-31 (citations omitted).

unconstitutional motives by government officials that the D.C. Circuit relied upon in Moore's appeal has been replaced by the standards articulated in *Crawford-El II*. Consequently, this Court reviews what is left of Moore's 108(h) statement and affidavit under the standards set fort in *Crawford-El II* to decide whether to grant the postal inspectors' motion for summary judgment on the *Bivens* claim for retaliatory prosecution.

According to *Crawford-El II*, a plaintiff opposing a summary judgment motion based upon a qualified immunity defense with respect to a motive-based constitutional claim must produce "clear and convincing proof of a defendant's unconstitutional motive." *Crawford-El II*, 93 F.3d at 838-39 (Ginsburg, J., concurring). If the plaintiff cannot meet the "clear and convincing" standard, the Court should grant summary judgment unless the plaintiff can show, "based upon such evidence as he may have without the benefit of discovery and any facts to which he can credibly attest," that he has "a reasonable likelihood of turning up evidence that a jury could consider clear and convincing proof of the defendant's unconstitutional motive." *Id.* at 841. If Moore's evidence against the postal inspectors meets the reasonable likelihood" standard, the Court will allow him to pursue "limited discovery." *Id.*

First, the Court asks if Moore can meet the "clear and convincing" standard. In their motion for summary judgment, the postal inspectors claim that under this new standard, Moore cannot establish that they had an unconstitutional motive, which is an essential element of a retaliatory prosecution claim. *See Haynesworth* v.

Miller, 820 F.2d 1245, 1257 n.93 (D.C. Cir. 1987).[19] To overcome the postal inspectors' summary judgment motion, Moore must come forward with specific facts from which a rational trier of fact could find by clear and convincing evidence that the postal inspectors possessed the motive of retaliating against Moore for his criticism of USPS. *See* FED. R. CIV. P. 56(e). As the D.C. Circuit has explained: "[T]he clear and convincing standard generally requires the trier of fact, in viewing each party's pile of evidence, to reach a firm conviction of the truth on the evidence about which he or she is certain." *United States* v. *Montague*, 40 F.3d 1251, 1254 (D.C. Cir. 1994) (citations omitted). The Court applies this standard to the remaining parts of Moore's 108(h) statement and affidavit to see if Moore has sufficient evidence that the postal inspectors possessed the requisite unconstitutional motive for a retaliatory prosecution claim.

The Court finds that Moore's amended 108(h) statement and affidavit establish the following facts with respect to the issue of motive. Moore voiced his criticism of USPS directly to USPS management, the media, and Congress in 1983. Members of USPS man-

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[19] The essential elements of a retaliatory prosecution claim under *Bivens* are: "first, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct." *Haynesworth*, 820 F.2d at 1257 n.93 (quoting *Wilson* v. *Thompson*, 593 F.2d 1375 (5th Cir. 1979)). If the plaintiff can establish these two elements, then the Court should consider a third: "whether the State has shown by a preponderance of the evidence that it would have reached the same decision as to whether to prosecute even had the impermissible purpose not been considered." *Id.*

agement, specifically PMG Bolger and Bolger's deputy, Jellison, were aware of Moore's criticism. In 1983, Bolger told Moore to "back off" of his criticism of USPS management, and Jellison said REI would never get any multi-line production awards while he was at USPS. In 1985, Moore lobbied to have Jellison and Bolger's successor as PMG, Paul N. Carlin, dismissed from USPS because of their opposition to REI's multi-line technology. That year, USPS began investigating REI for problems in their procurement process.

The postal inspectors participated in the investigation of REI and worked with Valder to obtain an indictment against Moore. The postal inspectors appeared hostile to Moore during the investigation. In the presence of the postal inspectors, Valder told William Hittinger that he did not care whether Moore was guilty or innocent because he needed to establish a good track record as a prosecutor. The postal inspectors did not repudiate Valder's comment. After Moore was indicted, but before he was tried, the Assistant PMG for Procurement insisted that Moore be put on leave of absence from REI, that he be terminated from REI, that REI not pay his legal fees, that he not be able to profit from any appreciation in REI stock, and that he lose all of his CEP perquisites. In response to this pressure, REI cut Moore's salary, bonuses, and privileges.

The Court of Appeals found that "[t]hese facts taken together constitute evidence sufficient to meet" the heightened pleading standards articulated in *Kartseva* v. *Moore*, 65 F.3d at 196. As *Crawford-El II* now applies to this case, this Court must determine whether these facts are sufficient to meet the new standard: whether they constitute clear and convincing evidence

of a retaliatory motive by the postal inspectors. Although Moore's evidence suggests that Bolger and Jellison were angry at Moore and were implicitly threatening him, this evidence does not show that *the postal inspectors* were upset with him. The evidence about Bolger and Jellison suggests that USPS management disliked Moore's public criticism of it and may have had a motive to retaliate against him by pursuing a baseless investigation and ultimate prosecution of him. However, while it is possible that management expressed this motive to the postal inspectors, Moore's evidence does not provide clear and convincing evidence that the postal inspectors themselves had a retaliatory motive.

Second, then, the Court must ask if Moore can show that he has a "reasonable likelihood of turning up evidence that a jury could consider clear and convincing proof of the defendant's unconstitutional motive." *Crawford-El II*, 93 F.3d at 841 (Ginsburg, J. concurring). Other facts show that Moore does meet this *Crawford El II* standard for "limited discovery." *Id.* The fact that the postal inspectors report to USPS management shows that they were likely aware of and influenced by management's hostility to Moore and REI. Moore's observations of the postal inspectors' hostility toward him during the USPS investigation supports this inference. In addition, the postal inspectors' failure to repudiate Valder's comment that he did not care whether Moore was guilty or not may mean they were also indifferent to Moore's innocence. This reasonable inference is supported by the postal inspectors' conduct in coercing Spartin to implicate Moore even after he had said nineteen times during his polygraph examination that Moore was not involved,

and their similar attempts to coerce Bray into implicating Moore. The postal inspectors' concealment of exculpatory evidence from the grand jury and their drafting and presentation of misleading witness statements also suggest a desire to get Moore prosecuted even if he were innocent. Lastly, the fact that the postal inspectors showed former PMG Carlin secret grand jury information suggests that they were trying to help Carlin in his civil case against Moore stemming from Moore and REI's efforts to get Carlin dismissed from USPS.

While these facts do not provide "clear and convincing" evidence that the postal inspectors sought Moore's prosecution in order to retaliate against him, the Court finds that they do show Moore that "a reasonable likelihood of turning up evidence that a jury could consider clear and convincing proof" that the postal inspectors sought to prosecute Moore in retaliation for his public criticism of USPS. *Crawford El II*, 93 F.3d at 841. The Court will therefore permit "limited discovery" with respect to Moore's *Bivens* claim for retaliatory prosecution against the postal inspectors. *Id.* Specifically, the Court will permit discovery tailored to the issue of whether the postal inspectors had the requisite retaliatory motive based on Moore's criticism of USPS.

The Court's decision to permit limited discovery is consistent with the D.C. Circuit's decision to remand Moore's retaliatory prosecution claim against the postal inspectors. *See Moore*, 65 F.3d at 196. In fact, at a status conference held in this Court on April 25, 1996, defense counsel admitted that the D.C. Circuit's holdings implied that discovery should proceed, stating that "we fully agree that document production should go

forward." 4/25/96 Hr. Tr. at 20. Magistrate Judge Kay had even ordered discovery to commence on October 14, 1996, but the decision in *Crawford El II* required staying discovery until this Court could determine whether the new standards permitted the planned discovery. This Court concludes that discovery is warranted under the new standards and refers this case to Magistrate Judge Kay to oversee discovery on Moore' *Bivens* claim for retaliatory prosecution against the postal inspectors.

D. *The Remanded FTCA Claims Against the United States*

On the basis of the alleged conduct of Valder and the postal inspectors described above, Moore brought claims against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 et seq. The FTCA waives the sovereign immunity of the United States in legal actions based on negligence or wrongful conduct of federal government employees. *See* 28 U.S.C. §§ 2671-2680. This waiver is subject to certain exceptions, including the "discretionary function" exception, which insulates the United States against liability arising out of an act or omission of a government employee exercising or failing to exercise a discretionary function. *See* 28 U.S.C. § 2680(a). On September 24, 1993, this Court held that Valder and the postal inspectors' alleged misconduct fell within the discretionary function exception and consequently dismissed Moore's FTCA claims for lack of subject matter jurisdiction.

On appeal, the D.C. Circuit held that "the United States enjoys immunity from Moore's claims that Valder and the postal inspectors pressured witnesses

into incriminating him, concealed and distorted exculpatory evidence to create a false impression of what he knew about the fraud schemes and withheld material exculpatory information from him after the grand jury returned an indictment." *Moore*, 65 F.3d at 197. The D.C. Circuit agreed that these activities fell within the FTCA's discretionary function exception, noting that:

> deciding whether to prosecute, assessing a witness's credibility to ensure that he is giving an accurate and complete account of what he knows, identifying the evidence to submit to the grand jury and determining whether information is 'exculpatory' and 'material' and therefore must be disclosed pursuant to a Brady request are actions that require the prosecutor to exercise his professional judgment.

Id. However, the D.C. Circuit found that "[d]isclosing grand jury testimony to unauthorized third parties . . . is not a discretionary activity nor is it inextricably tied to matters requiring the exercise of discretion." *Id.* The Court of Appeals instructed this Court to reconsider the alleged disclosures of grand jury material, but warned that it "express[ed] no view whether the allegation is otherwise cognizable under the FTCA or whether it is supported by the evidence." *Id.*

The Court of Appeals' opinion disposes of all of the allegations against the United States in Moore's FTCA Complaint other than paragraph 26 which alleges that Valder and the postal inspectors violated Federal Rule of Criminal Procedure 6(e) by disclosing grand jury testimony to two unauthorized third parties. *See id.* at 197; FTCA Complaint at ¶ 26. Specifically, the Complaint makes two claims: one of malicious prosecution

and one of abuse of process. First, the Complaint alleges that Valder and the postal inspectors gave William Spartin, the president of GAI and the prosecution's primary witness against Moore, access to "Grand Jury testimony of other witnesses for the purpose of influencing Spartin's testimony." FTCA Complaint at ¶ 26. In Moore's view, this alleged disclosure to Spartin constitutes malicious prosecution and renders the United States liable under the FTCA. Second, the Complaint alleges that Valder and the postal inspectors gave grand jury testimony of other witnesses and "a copy of a draft indictment" to former PMG Paul Carlin "for the apparent purpose of assisting Carlin, a private plaintiff, to pursue civil litigation in connection with his dismissal from the Postal Service." *Id.* Moore argues that the unauthorized disclosure of grand jury information to Carlin establishes an abuse of process claim under the FTCA.

The torts of malicious prosecution and abuse of process cannot form the basis of an FTCA claim unless they were committed by "investigative or law enforcement officers of the United States government." *See* 28 U.S.C. § 2680(h).[20] According to the FTCA, a person is

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[20] Section 2680(h) reads:

> The provision of this chapter and § 1346(b) of this title shall not apply to any claim arising out of an assault, battery, false imprisonment, false arrest, *malicious prosecution, abuse of process*, libel, slander, misrepresentation, deceit, or interference with contract rights: provided, that, with regard to acts or omissions of *investigative or law enforcement officers of the United States government*, the provisions of this chapter and § 1346(b) of this title shall apply to any claim arising on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, *abuse of process, or malicious prosecution.*

an "investigative or law enforcement officer" if empowered by law to execute searches, seize evidence, or make arrests for violations of Federal law. *See* 28 U.S.C. § 2680(h). As postal inspectors are authorized to perform all three functions, *see* 39 C.F.R. § 233.1 (1998), their alleged conduct can form the basis of Moore's FTCA claims for malicious prosecution and abuse of process. *See, e.g., Crow* v. *United States*, 634 F. Supp. 1085, 1088 (D. Kan. 1986). Valder's alleged conduct, however, cannot form the basis of either of Moore's FTCA claims because federal prosecutors cannot perform such functions and therefore are not "investigative or law enforcement officers" under § 26280(h).[21] Accordingly, the Court will not consider Valder's alleged disclosures of grand jury material in deciding the government's dispositive motion.

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, defendant United States moves for judgment on the pleadings with respect to Moore's remaining FTCA claims that the postal inspectors disclosed grand jury testimony to unauthorized third parties.[22]

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28 U.S.C. § 2680(h) (emphasis added).

[21] *See e.g., Bernard* v. *United States*, 25 F.3d 98 (2d Cir. 1994); *Ames* v. *United States*, 600 F.3d 183, 185 n.3 (8th Cir. 1979); *Gray* v. *Bell*, 542 F. Supp. 927, 932 (D.D.C. 1982), *aff'd*, 712 F.2d 490 (D.C. Cir. 1983). The Court follows the clear language of 28 U.S.C. § 2680(h) and the holdings in these cases and rejects Moore's argument that AUSA Valder be treated as an "investigative or law enforcement officer" because he was engaged in "investigative" activities when he allegedly disclosed grand jury materials.

[22] The United States also moves, in the alternative, for dismissal of the action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. In light of this Court's decision to grant the motion for judgment on the

The Court may grant a motion for judgment on the pleadings if, at the close of the pleadings, no material fact remains in dispute and the moving party is entitled to judgment as a matter of law. *Haynesworth* v. *Miller*, 820 F.2d 1245, 1249 n.11 (D.C. Cir. 1987). In considering such a motion, the Court must view the complaint in the light most favorable to the plaintiff and accept as true the factual allegations set forth therein and all reasonable inferences drawn from those allegations. *Id.*

Whether the postal inspectors' alleged disclosures of grand jury information to Spartin and Carlin establish actionable claims of malicious prosecution and abuse of process against the United States are the only FTCA issues facing this Court on remand. The Court will look first at the malicious prosecution claim and then the abuse of process claim to determine if the United States is entitled to judgment as a matter of law on either of these claims.

Malicious Prosecution

Defendant United States argues that Moore cannot establish the essential elements of his malicious prosecution claim on the basis of the postal inspectors' alleged disclosures of grand jury information to Spartin. The FTCA incorporates the substantive law of the place where the alleged tortious conduct occurred, which in this case is the District of Columbia. *See* 28 U.S.C. § 1346(b). Under D.C. law, the tort of malicious prosecution has four elements: (1) the initiation or procurement of a criminal proceeding by the defendant against the plaintiff; (2) absence of probable cause for

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pleadings in favor of the United States, the alternative motion to dismiss for lack of subject matter jurisdiction is moot.

the proceedings; (3) termination of the proceeding in favor of the plaintiff; and (4) malicious intent on the part of the defendant. *See Davis* v. *Giles*, 769 F.2d 813, 814-15 (D.C. Cir. 1985); *accord Ammerman* v. *Newman*, 384 A.2d 637, 639 (D.C. App. 1978). Failure to satisfy any one of these four elements is "fatal" to a claim of malicious prosecution. *See Jarett* v. *Walker*, 201 A.2d 523, 526 (D.C. App. 1964) (citing *Bumphus* v. *Smith*, 189 A.2d 130, 131 (D.C. App. 1963)).[23]

According to defendant United States, Moore cannot satisfy the first element, that the postal inspectors initiated or procured Moore's prosecution, given the holdings of the D.C. Circuit in *Moore* v. *Valder*, 65 F.3d 189 (D.C. 1995). First, the D.C. Circuit made clear that the discretionary function exception applies to the "decision to prosecute and the presentation of evidence to the Grand Jury." *Moore*, 65 F.3d at 196-97 (citing *Gray* v. *Bell*, 712 F.2d 508, 516 (D.C. Cir. 1983)). Hence, even if the postal inspectors "decided to prosecute" Moore or "caused" him to be prosecuted by presenting Spartin's manipulated testimony to the Grand Jury, their conduct could not provide a basis for liability because such conduct is discretionary. Second, the postal inspectors' alleged disclosure of grand jury testimony to Spartin, which is the only non-discretionary conduct that this Court must consider on remand, cannot establish the first element given the D.C. Circuit's holding that such "unauthorized dis-

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[23] *Jarett* applies the elements of malicious prosecution under Maryland law instead of D.C. law, but as the District of Columbia Court of Appeals explains, "[t]he necessary elements to support a case for malicious prosecution are the same under Maryland law as recognized in this jurisdiction." *Jarett*, 201 A.2d at 526 (citations omitted).

closure 'does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions.'" *Moore*, 65 F.3d at 195 (quoting *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 278 (1993)).

Moore faces a third obstacle in trying to establish that the postal inspectors initiated or procured the prosecution of Moore, which the Court asked the parties to brief in its Order of September 26, 1997. That Order directed the parties to address the following question:

> If Assistant United States Attorney Valder is not an "investigative or law enforcement officer," provide authority for the proposition that the conduct of the postal inspectors alone can satisfy the elements of a malicious prosecution claim against the United States under the FTCA. Further support the proposition that an adequate casual nexus existed between the conduct of the postal inspectors and Assistant United States Attorney Valder's decisions to initiate and continue the prosecution of plaintiff Moore.

In the D.C. Circuit, a plaintiff alleging malicious prosecution under the FTCA must show "a sufficient causal nexus" between the acts of the defendant and the United States Attorney's decision to prosecute the plaintiff. *Dellums* v. *Powell*, 566 F.2d 167, 194 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978) ("*Dellums I*"); *Dellums* v. *Powell*, 660 F.2d 802, 804 n.3 (D.C. Cir. 1981) ("*Dellums II*"). The law presumes that United States Attorneys act independently when they institute prosecutions unless the plaintiff can show "a chain of causation" between the defendant's conduct and the

initiation of the prosecution. *See Dellums I*, 566 F.2d at 192. If the United States Attorney's decision to prosecute was "independent of any pressure or influence exerted and of any misstatements" by the defendant, "the chain of causation . . . is broken." *Id.* at 193 (citations omitted).

Given that this Court lacks jurisdiction under the FTCA to base a malicious prosecution claim on AUSA Valder's conduct, *see* 28 U.S.C. § 2680(h), and that a malicious prosecution claims requires that the defendant "instituted or procured" the prosecution, Moore must show that the postal inspectors' alleged disclosures of grand jury testimony to Spartin played a sufficiently causal role in Valder's decision to prosecute Moore. In light of the D.C. Circuit holdings in *Moore* and *Dellums*, Moore tries to distinguish the actual decision to prosecute, which is clearly discretionary, from improper actions taken by the postal inspectors to initiate and continue Moore's prosecution. According to Moore, such actions include the postal inspectors' alleged efforts to mislead the grand jury into indicting Moore by concealing, distorting, and manufacturing evidence and their efforts to pressure Spartin into incriminating Moore by showing him grand jury statements drafted by the postal inspectors. Moore argues that these actions established the first element because the disclosure of the grand jury information caused Spartin to incriminate Moore in his testimony before the grand jury, "which in turn led to the grand jury indictment of Moore that continued the prosecution of Moore." Supplemental Brief at 11. Lastly, Moore asserts that "it makes no difference that AUSA Valder was, *for his own reasons*, determined to prosecute Moore" because "[t]he postal inspectors misconduct *continue* Mr.

Moore's prosecution *by influencing the grand jury, not Valder.*" *Id.* at 12 (emphasis added).

The Court finds that Moore has not established an adequate "causal nexus" between the postal inspectors' disclosure of grand jury information to Spartin and the initiation of Moore's prosecution. Moore has not alleged that the postal inspectors pressure Valder into prosecuting Moore or knowingly made misrepresentations to Valder that led him to prosecute Moore when he otherwise would not have. *See Dellums I*, 566 F.2d 193. In fact, Moore has conceded that the postal inspectors did *not* influence Valder's decision to prosecute, and that Valder was "determined to prosecute Moore" independent of their conduct. Moore has alleged only that the postal inspectors influenced the grand jury's decision to indict, claiming that Spartin's manipulated testimony "must have led the grand jury to indict Moore." Supplemental Brief at 10.

Moore's allegations ignore the fact that malicious prosecution requires the initiative of a prosecution by the Executive Branch, not the grand jury.[24] Even if this Court could determine that Spartin's testimony "caused" the indictment,[25] this would not satisfy the first element because a grand jury indictment cannot by

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[24] *See United States* v. *Nixon*, 418 U.S. 683, 693 (1974) ("The Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case") (citations omitted); *In Re Sealed Case*, 838 F.2d 476, 488 (D.C. Cir. 1988), *reversed on other grounds*, 487 U.S. 654 (1988) ("the Constitution vests the power to initiate a criminal prosecution exclusively in the Executive Branch").

[25] Moore concedes that "[i]t is, of course, impossible to gauge exactly the impact of Spartin's testimony." Supplemental Brief at 10 n.3.

itself initiate a prosecution.[26] Moreover, Moore's concession that Valder's decision to prosecute was independent of the postal inspectors' misconduct breaks whatever causal chain he sought to establish and thereby defeats his malicious prosecution claim under the FTCA. *See Dellums I*, 566 F.2d at 193.

The Court also finds that Moore cannot establish a casual chain between the postal inspectors' disclosure of grand jury testimony and the initiation of Moore's prosecution without relying on conduct that has already been declared protected by the FTCA's discretionary function exception. The disclosure is significant to a malicious prosecution claim only if it resulted in the initiation or procurement of Moore's prosecution. Moore claims the disclosure was made to pressure Spartin into implicating Moore during his grand jury testimony so that Moore would be indicted. Moore also claims that the postal inspectors presented Spartin's manipulated testimony to the grand jury and concealed his exculpatory statements in order to get Moore indicted and ultimately prosecuted.

This alleged conduct, however, cannot form the basis of a malicious prosecution claim because the Court of Appeals explicitly held that "the United States enjoys immunity from Moore's claims that Valder and the postal workers *pressured witnesses into incriminating him, concealed and distorted exculpatory evidence to create false impression of what he knew about the fraud schemes and withheld material exculpatory information* from him after the grand jury returned an

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[26] *See Unite States* v. *Cox*, 342 F.2d 167, 172 (5th Cir. 1965) (noting that a grand jury's decision to indict cannot cause a prosecution to be initiated because the prosecution must sign the indictment to institute proceedings).

indictment." *Moore*, 65 F.3d at 197 (emphasis added). This holding and Moore's concession that the postal inspectors did not influence Valder's decision to prosecute preclude Moore from establishing the causal chain required by the first element of malicious prosecution. The Court notes that if the disclosure of grand jury information by the postal inspectors occurred as alleged, it would constitute a reprehensible violation of Federal Rule of Criminal Procedure 6(e); however, the alleged disclosure is simply insufficient to support an FTCA claim for malicious prosecution.[27]

Abuse of Process

In its FTCA complaint against the United States, Moore alleges that the postal inspectors gave secret grand jury information, including witness statements and a draft indictment, to former PMG Carlin in order to help him pursue a civil action against Moore and REI for his dismissal from USPS. *See* FTCA Complaint at

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[27] Defendant United States also claims the allegations in the Complaint cannot satisfy the second element regarding lack of probable cause or the fourth element regarding malicious intent because of the "inherently discretionary nature" of such elements. The Complaint alleges that Valder and the postal inspectors knew Moore was innocent and yet deliberately misled the grand jury into indicting him. *See* FTCA Complaint at ¶ 21-28. Although Moore claims these allegations show the postal inspectors acted without probable cause and with malicious intent, Moore fails to address the Court of Appeals' holding that concealing, distorting, and withholding exculpatory evidence "to create a false impression of what he [Moore] knew about the fraud schemes" fell within the discretionary function exception of the FTCA. *Moore*, 65 F.3d at 197. Nevertheless, because this Court finds the malicious prosecution claim fails on the basis of the first element, it does not reach the issue of whether Moore can establish the other three elements.

¶ 26. Defendant United States contends that these allegations, even if true, do not satisfy the elements of an abuse of process claim[28] and that the United States is therefore entitled to judgment on the pleadings under Rule 12(c). As noted above, the FTCA incorporates the substantive law of the place where the alleged tortious conduct occurred, which in this case is the District of Columbia. *See* 28 U.S.C. § 1346(b). Accordingly, the Court looks to D.C. law on the tort of abuse of process to decide the Rule 12(c) motion.

Under D.C. law, "[t]he critical concern in abuse of process cases is whether process was used to accomplish an end unintended by law, and whether the suit was instituted to achieve a result not regularly or legally obtainable." *Morowitz* v. *Marvel*, 423 A.2d 196, 198 (D.C. App. 1980). However, "the fact that a person acts spitefully, maliciously, or with an ulterior motive in instituting a legal proceeding is insufficient to establish abuse of process." *Scott* v. *District of Columbia*, 101 F.2d 748, 755 (D.C. Cir. 1997). As the D.C. Circuit has made clear, "there is no action for abuse of process when the process is used for the purpose for which it is intended" even if there is an "incidental motive of spite or an ulterior purpose of benefit to the defendant." *Id.* (citation omitted). In other words, "'[n]o matter what ulterior motive may have prompted it,' . . . one who invokes the legal process to obtain such relief as it

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[28] Moore's abuse of process claim differs from his malicious prosecution claim in the following respect: "The essence of the tort is the use of legal process for improper purposes, and so abuse of process is conceptually different from, but overlaps with, malicious prosecution, the latter of which occurs only when a legal action is brought without probable cause." *Neumann* v. *Vidal*, 710 F.2d 856, 860 (D.C. Cir. 1983).

offers commits no abuse of process." *Harrison* v. *Howard Univ.*, 846 F. Supp. 1, 2-3 (D.D.C. 1993) (quoting *Morowitz*, 423 A.2d at 198), *aff'd*, 48 F.3d 562 (D.C. Cir. 1995). The plaintiff must show that defendant used some legal process "for an *immediate* purpose other than that for which it was designed and intended." *Scott*, 101 F.3d at 755 (citation omitted) (emphasis added).[29]

The D.C. Circuit recognizes that using the grand jury subpoena process for a single purpose other than investigating a crime or obtaining evidence relevant to a crime can constitute an abuse of process. *See, e.g.*, *Doe* v. *DiGenova*, 779 F.2d 74 (D.C. Cir. 1985). In *Doe* v. *DiGenova*, the plaintiff alleged that an Assistant United States Attorney abused the process of the grand jury by issuing a subpoena for veteran medical records "not to investigate the crime, but to evaluate the viability of a yet to be asserted insanity defense." *Id.* 91. The Court of Appeals remarked, that "[h]ad [exploration of Doe's possible insanity defense] been the *only* reason behind the subpoena, this Court would be troubled." *Id.* (emphasis added). On remand, however, the district court found there was no abuse of process because the prosecutor had subpoenaed the plaintiff's records for two reasons: to determine whether the plaintiff was defrauding the Veterans' Administration and whether the defense of insanity was available. The D.C. Circuit affirmed the lower court's finding that this use of the subpoena was "entirely

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[29] *See also Wilcon* v. *Traveler's Indemnity Company*, 654 F.2d 976, 984 (5th Cir. 1981) ("the plaintiff need only show that the defendant acted '*primarily*' to accomplish an *immediate* purpose for which the process was not designed") (quoting Restatement (Second) of Torts § 682 (1977)) (emphasis added).

consistent with the purpose of grand jury proceedings, which is 'to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person.'" *Doe* v. *DiGenova*, 642 F. Supp. 624, 631 (D.D.C. 1986) (citation omitted), *aff'd sub nom. Doe* v. *Stephens*, 851 F.2d 1457, 1463 (D.C. Cir. 1988) ("we agree with the district court that this [abuse of process] claim affords no basis for relief").

Moore claims the postal inspectors misused the grand jury process to divulge secret information to Carlin in order to help him pursue a civil action against Moore. Applying D.C. law on abuse of process to Moore's Complaint and accepting his allegations as true in accordance with Rule 12(c), the Court finds that the postal inspectors improperly disclosed grand jury information to Carlin in violation of Federal Rule of Criminal Procedure 6(e) and possessed the "ulterior motive" of assisting Carlin's private suit. *See Scott*, 101 F.3d at 755. However, because there is no abuse of process under D.C. law if the legal process was used for its intended purpose, *see id.*, in order to prevail, Moore must allege that the postal inspectors did *not* use the grand jury process for its intended purposes of investigating potential crimes and identifying evidence for submission to the grand jury, but rather invoked the process for the sole and "immediate purpose" of obtaining information helpful to Carlin's case against Moore. *Id.*; *see Doe* v. *Di Genova*, 779 F.2d at 91.

The allegations in Moore's FTCA complaint do not establish an abuse of process claim.[30] Moore has not

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[30] The facts Moore alleges differ markedly from those in a case in which the court found the defendant's use of the subpoena process constituted abuse of process. The Court of Appeals of New York found that "on its face an allegation that defendants had

alleged enough facts to infer that the postal inspectors used the grand jury process to obtain witness statements and to draft an indictment for the sole and "immediate purpose" of assisting Carlin in his case against Moore, instead of for the process's intended purpose of investigating crimes and identifying evidence to present to the grand jury. Moore has alleged only that the postal inspectors gave Carlin access to secret information that had been obtained through the grand jury process in order to help him with his civil case. *See* FTCA Complaint at ¶ 26. Though this allegation satisfies the ulterior motive requirement, it fails to show the process was used solely for an "*immediate* purpose other than that for which it was designed or intended." *Scott*, 101 F.3d at 755; *see Doe* v. *DiGenova*, 779 F.2d at 91. As the holdings in *Scott*, *DiGenova*, and *Harrison* show, the postal inspectors could not have committed an abuse of process if they properly used the grand jury process to investigate crimes and identify evidence to present to the grand jury even though they

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subpoenaed 87 persons with full knowledge that they all could not and would not testify and that this was done maliciously with the intent to injure and to harass plaintiff spell[ed] out an abuse of process." *Board of Educ. of Farming Union Free School Dist.* v. *Farmingdale Classroom Teachers Association, Inc., Local 1889, AFT AFL–CIO*, 343 N.E.2d 278 (N.Y. 1975). In *Farmingdale*, a teacher's association had issued subpoenas to 87 teachers to compel their appearance as witnesses at a hearing. *Id.* at 280. When the school district requested that most teachers be excused and that staggered hearing dates be set for the remaining teachers, the teacher's association refused, forcing the district to hire 77 substitute teachers. *Id.* The court of Appeals for New York found these allegations supported an inference that the teacher's association had perverted the subpoena process for the purpose of causing the school district economic harm. *Id.* at 283.

may have also had the "incidental" ulterior motive of obtaining the information for Carlin's benefit.

On the basis of the pleadings and in the absence of allegations to the contrary, this Court finds that the postal inspectors invoked the grand jury process for its intended purpose of identifying evidence for submission to the grand jury and that the "ulterior motive" of helping Carlin was not their "immediate purpose," but rather a purpose that developed after the process had been invoked and the grand jury information had been obtained. In *Moore*, the D.C. Circuit expressly held that "identifying the evidence to submit to the grand jury" is protected activity under the FTCA's discretionary function exception. *Moore*, 65 F.3d at 197. In light of this holding and Moore's failure to allege otherwise, this Court finds that the postal inspectors' primary and immediate use or the grand jury process to obtain evidence for submission to the grand jury and to prepare an indictment precludes Moore from basing an abuse of process claim on the postal inspectors' subsequent disclosures of witness testimony and a draft indictment to Carlin. Accepting the allegations in the Complaint as true and drawing all reasonable inferences therefrom, this Court holds that no material fact remains in dispute and that the United States is entitled to judgment on the pleadings as a matter of law with respect to Moore's abuse of process claim under the FTCA. *See* FED. R. CIV. P. 12(c).

III. CONCLUSION

For the reasons given above, the Court will grant in part and deny in part defendant Postal Inspectors' Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement and defendant Valder's

Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement. The Court will grant defendant Valder's Motion for Summary Judgment, and deny as moot Plaintiff's Motion to Clarify the Stay Order of September 16, 1996. The Court will deny defendant Postal Inspectors' Motion for Summary Judgment and permit limited discovery to proceed on plaintiff's *Bivens* claim for retaliatory prosecution against the postal inspectors. Lastly, the Court will grant defendant United States' Motion for Judgment on the Pleadings, and deny as moot its Alternative Motion to Dismiss for Lack of Subject Matter Jurisdiction.

An Order will accompany this Memorandum Opinion.

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

February 5, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2288 (NHJ)
(Consolidated with Civil No. 93CV0324 (NHJ))

WILLIAM G. MOORE, JR., PLAINTIFF

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

Civil Action No. 93-0324 (NHJ)
(Consolidated with Civil No. 92CV2288 (NHJ))

WILLIAM G. MOORE, JR., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Feb. 5, 1998

ORDER

Upon careful consideration of the parties' pending motions, memoranda in support and in opposition, and the entire record, and for the reasons given in the accompanying Memorandum Opinion, it is this 5th day of February, 1998,

ORDERED that defendant Postal Inspectors' Motion to Strike Affidavit and Plaintiff's Amended Local Rule

108(h) Statement [# 131] be, and hereby is, granted in part and denied in part; it is further

ORDERED that defendant Valder's Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement [#136] be, and hereby is, granted in part and denied in part; it is further

ORDERED that defendant Valder's Motion for Summary Judgment [#126] be, and hereby is granted; it is further

ORDERED that plaintiff's Motion to Clarify the Stay Order of September 16, 1996, [#125] be, and hereby is, denied as moot; it is further

ORDERED that defendant Postal Inspectors' Motion for Summary Judgment [#103] be, and hereby is, denied; it is further

ORDERED that defendant United States' Motion for Judgment on the Pleadings [#94-1] be, and hereby is granted; it is further

ORDERED that defendant United States' Motion in the Alternative to Dismiss for Lack of Subject Matter Jurisdiction [#94-2] be, and hereby is, denied as moot; it is further

ORDERED that discovery on plaintiff's *Bivens* claim of retaliatory prosecution against the postal inspectors proceed as indicated in this Opinion; and it is further

ORDERED by the Court, *sua sponte*, that plaintiff's *Bivens* claim of retaliatory prosecution against the postal inspectors be, and hereby is, referred to Magistrate Judge Kay for discovery and pretrial. Unless otherwise ordered by this Court, contested preliminary motions within Local Rule 209 will likewise be heard by Magistrate Judge Kay. All other motions will be heard by the Court.

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 93-5341, 93-5343

WILLIAM G. MOORE, JR., APPELLANT

v.

JOSEPH B. VALDER, ET AL., APPELLEES

Argued: Jan. 18, 1995

Decided: Sept. 22, 1995

Before: EDWARDS, Chief Judge; WALD and HENDERSON, Circuit Judges.

KAREN LECRAFT HENDERSON, Circuit Judge:

Appellant William G. Moore, Jr. (Moore) appeals the dismissal of his *Bivens* and Federal Tort Claims Act claims against Assistant United States Attorney Joseph B. Valder (Valder), six United States Postal Service Inspectors (postal inspectors)[1] and the United States. Moore sued for injuries allegedly caused by Valder's and the postal inspectors' malicious and retaliatory prosecution of him. We affirm in part and reverse in part.

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[1] The postal inspector defendants-appellees are Michael Hartman, Frank Korman, Robert Edwards, Pierce McIntosh, Daniel Harrington and Norman Robbins.

I.

Moore was indicted in October 1988 on various counts of theft and fraud. Moore was chairman, president and chief executive officer of Recognition Equipment Incorporated (REI), a company interested in supplying the U.S. Postal Service (USPS) with address-scanning equipment. The indictment charged that Moore and Robert Reedy, another REI employee, engaged in a scheme to defraud the federal government by persuading William Spartin to recommend for the position of United States Postmaster General a candidate who favored using REI's address-scanning equipment. Spartin was both president of Gnau & Associates, Inc. (GAI), a consulting firm hired by REI, and president of a subsidiary of an executive search firm hired by the USPS to identify a qualified candidate to serve as Postmaster General. The indictment also accused Moore and Reedy of participating in a scheme by which GAI employees paid money to Peter E. Voss, a member of the USPS Board of Governors, in return for Voss's steering business to GAI and its clients. REI had hired GAI at the suggestion of Voss. Five co-conspirators, including Voss and John R. Gnau, Jr., the principal of GAI, either pleaded guilty or testified about the fraud pursuant to a grant of immunity.

In November 1989, at the close of the government's case in Moore's criminal non-jury trial, the district court granted Moore's motion for a judgment of acquittal. *United States* v. *Recognition Equip. Inc.*, 725 F. Supp. 587 (D.D.C. 1989). The district court found insufficient evidence to support a reasonable inference that Moore and Reedy knew of either scheme. *Id.* Moore then filed a complaint in the U.S. District Court for the Northern District of Texas against Valder and

the postal inspectors, asserting a *Bivens*[2] cause of action for malicious prosecution (malicious prosecution claim) and a *Bivens* claim for prosecution in retaliation for the exercise of his first amendment right (retaliatory prosecution claim).[3] Moore later filed a second complaint in the Northern District of Texas seeking recovery from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671 *et seq.*, for the same alleged injuries.

In the two complaints Moore alleged that Valder and the postal inspectors maliciously prosecuted him, even though they knew that he was unaware of the fraud, based on his and REI's criticism of USPS procurement policies and on his recommendations to the President of qualified candidates for Postmaster General. In addition, Moore alleged other misconduct, including claims that Valder told several postal inspectors in the presence of a grand jury witness that he did not care whether Moore was in fact guilty because he wanted to secure a "high- profile" indictment to further his career; that Valder and the postal inspectors intimidated and coerced witnesses into changing their testimony to incriminate Moore; that they concealed evidence of Moore's innocence; that they manipulated witness testimony and presented to the grand jury false, incomplete and misleading written witness statements; that

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[2] *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (recognizing a cause of action for damages against officials who violate constitutional or statutory rights under color of federal law).

[3] The complaint also asserted other constitutional and common-law tort claims which were dismissed by the district court. Moore does not appeal the dismissal of those claims.

they lost, destroyed or concealed from the grand jury exculpatory information; that they disclosed grand jury testimony to third parties; and that Valder withheld material exculpatory information from Moore after indictment.

The district court dismissed the *Bivens* claims against Valder, holding that he was protected by absolute immunity. The court denied the postal inspectors' motion to dismiss the *Bivens* claims against them on the ground of qualified immunity and then transferred the remaining claims to the U.S. District Court for the District of Columbia, concluding that it lacked in personam jurisdiction. The FTCA complaint was also transferred and the parties stipulated to the consolidation of the two cases by the district court here.

The district court first denied Moore's motion to return the complaints to the Northern District of Texas. The court then dismissed the *Bivens* claims against the postal inspectors because Moore's complaint did not recite direct evidence of their alleged unconstitutional motive and therefore did not satisfy a heightened pleading standard. The court also dismissed the FTCA claims for lack of subject matter jurisdiction, holding that the alleged misconduct fell within the FTCA's discretionary function exception.

II.

On appeal Moore contends that Valder is not entitled to absolute immunity; that the court erred in applying a heightened pleading standard to his *Bivens* complaint; and that the FTCA's discretionary function exception does not preserve the United States's sovereign immunity from liability for the alleged misconduct. In analyzing his claims, we group the specific misconduct

alleged by Moore into four categories: pressuring witnesses into incriminating Moore; concealing and distorting exculpatory evidence to create misleading or incomplete witness accounts of what Moore knew about the alleged fraud;[4] withholding material exculpatory information from Moore after indictment; and disclosing grand jury testimony to unauthorized third parties.

A. *Claims Against Valder*

The district court dismissed Moore's *Bivens* claims against Valder, holding that Valder was protected by absolute immunity.[5] We review *de novo* a dismissal for failure to state a claim upon which relief can be granted but accept the facts as alleged in the complaint. *Kowal* v. *MCI Communications Corp.*, 16 F.3d 1271, 1276, 1273 (D.C. Cir. 1994). We hold that absolute immunity shields Valder from liability for the decision to prosecute Moore and for some, but not all, of the other alleged instances of misconduct.

In several decisions the Supreme Court has considered whether and to what extent a state or local prosecutor *qua* prosecutor is immune from liability

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[4] We do not read Moore's complaint to allege that Valder or the postal inspectors *manufactured* false evidence to incriminate Moore. The complaint, construed favorably to Moore, alleges only that the written witness statements, prepared by Valder and the postal inspectors and submitted to the grand jury, created false impressions because they omitted important exculpatory testimony. Joint Appendix (JA) 377-78.

[5] According to the district court, "Valder was performing judicial and quasi-judicial functions. All of Valder's conduct relevant to this case was preparatory to presenting a case against Moore to the grand jury. The face of the complaint compels the conclusion that all of the acts attributed to Valder were prosecutorial functions. . . ." JA 340.

under 42 U.S.C. § 1983. As the Court has recognized, the law of immunity in a *Bivens* claim against a federal official mirrors that in a section 1983 claim against a state official. *See, e.g., Butz* v. *Economou*, 438 U.S. 478, 504, 98 S. Ct. 2894, 2909-10, 57 L. Ed. 2d 895 (1978) (deeming it "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials"); *see also Briggs* v. *Goodwin*, 569 F.2d 10, 17-18 n.8 (D.C. Cir. 1977) ("*[A]ssuming* the rule of *Bivens* comprehends a damage action for a particular constitutional infringement by a federal officer, the federally-determined immunity applicable in such a case should be no different from the federally-determined immunity available in a § 1983 suit against a state official.") (emphasis original). Accordingly, we look to those decisions for guidance.

In *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976), the Supreme Court held that a prosecutor enjoys absolute immunity from section 1983 liability when he acts "as an advocate" by engaging in activities "intimately associated with the judicial phase of the criminal process." *Id.* at 430, 96 S. Ct. at 995. As the Court in *Imbler* noted, the common law afforded absolute immunity to prosecutors for several reasons. Immunity encourages vigorous decisionmaking by reducing, if not eliminating, liability's inhibitory effect, *id.* at 424-25, 96 S. Ct. at 992-93; it protects prosecutors against having "to answer in court each time [a defendant] charge[s] him with wrongdoing [which diverts] his energy and attention . . . from the pressing duty of enforcing the criminal law," *id.* at 425, 96 S. Ct. at 992; and it ensures that judges are not influenced "by even the subconscious knowledge that a post-trial decision in

favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." *Id.* at 427, 96 S. Ct. at 993. Alternative mechanisms, such as the trial judge's remedial powers, appellate review and post-conviction collateral remedies, exist to remedy injury caused by prosecutorial misconduct. *Id.* In addition, there are alternative ways to deter and punish prosecutorial misconduct, such as subjecting the prosecutor to criminal prosecution or professional discipline. *Id.* at 429, 96 S. Ct. at 994.

The Court in *Imbler* held that "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983." *Id.* at 424, 96 S. Ct. at 992. At a minimum, advocatory conduct includes "initiating a prosecution" and "presenting the State's case." *Id.* at 431, 96 S. Ct. at 995-96.[6] Recognizing that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," the Court acknowledged that distinguishing between action taken as an advocate and action taken as an administrator or investigator "may present difficult questions." *Id.* at 431 n.33, 96 S. Ct. at 996 n.33.

The line between advocatory conduct and administrative or investigative activity was refined in *Burns* v. *Reed*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547

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[6] Additionally, "whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present" are advocatory decisions. *Imbler*, 424 U.S. at 431 n.33, 96 S. Ct. at 996 n.33.

(1991). Using a "functional approach," the Court emphasized that lower courts must look at the nature of the function performed, not the identity of the person performing it, to determine if a prosecutor is clothed with absolute immunity. The prosecutor must establish that the *conduct* under review was advocatory in nature. *Id.* at 486, 111 S. Ct. at 1939. The Court held that participation in a probable cause hearing ("appearing before a judge and presenting evidence in support of a motion for a search warrant") is protected by absolute immunity but giving legal advice to police officers is not. "Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation. That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Id.* at 494, 111 S. Ct. at 1943-44. The Court warned that "[a]lmost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive." *Id.* at 495, 111 S. Ct. at 1944.

Most recently, the Court discussed the scope of absolute prosecutorial immunity in *Buckley* v. *Fitzsimmons*, —U.S. —, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993). There, the Court reaffirmed that "as the function test of *Imbler* recognizes, the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Id.* at ——, 113 S. Ct. at 2615. Advocatory conduct protected by absolute immunity "include[s] the professional evaluation of the evidence assembled by the police and appropriate pre-

paration for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Id.* But when a prosecutor "performs the investigative functions normally performed by a detective or police officer," he is entitled only to the qualified immunity that the detective or police officer enjoys. *Id.* at ——, 113 S. Ct. at 2616-17.

In *Buckley*, the petitioner alleged that the prosecutors fabricated evidence during the preliminary investigation of a crime and made false statements at a press conference announcing the indictment of the petitioner. The Court held that the prosecutors did not have absolute immunity from liability for the alleged fabrication of evidence because they did not have probable cause to arrest or to initiate judicial proceedings. *Id.* at ——, 113 S. Ct. at 2616. "Their mission at that time was entirely investigative in character. A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* The Court emphasized that the alleged fabrication occurred before a grand jury was convened and that when the grand jury eventually was convened, "its immediate purpose was to conduct a more thorough investigation of the crime—not to return an indictment against a suspect whom there was already probable cause to arrest." *Id.* The Court also held that a prosecutor is not absolutely immune from liability for making allegedly false statements to the press because statements to the media "have no functional tie to the judicial process." *Id.* at ——, 113 S. Ct. at 2618.

Applying these holdings here, we conclude that Valder's prosecutorial immunity insulates him from liability for his unquestionably advocatory decision to

prosecute Moore. His prosecutorial immunity also protects Valder from liability for allegedly concealing exculpatory evidence from the grand jury and for allegedly manipulating evidence before the grand jury to create a false impression of what Moore knew about the alleged fraudulent schemes. Valder's decisions regarding what evidence to put before the grand jury, and in what manner, are advocatory because they are central to the prosecutor's task of "initiating a prosecution" and "presenting the State's case." *Imbler*, 424 U.S. at 431, 96 S. Ct. at 996; *see also Hill* v. *City of New York*, 45 F.3d 653, 661-62 (2d Cir. 1995) (holding absolute immunity protects prosecutor from liability for withholding exculpatory evidence from grand jury). In addition, withholding after indictment information that is subject to disclosure under *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), is advocatory. In *Imbler*, the prosecutor was alleged to have knowingly used false testimony and suppressed material exculpatory evidence at trial. The Court upheld the lower courts' rulings that the prosecutor was absolutely immune from potential liability for the alleged misconduct. As other courts have recognized, it follows from *Imbler* that the failure, be it knowing or inadvertent, to disclose material exculpatory evidence before trial also falls within the protection afforded by absolute prosecutorial immunity. *See Hill*, 45 F.3d at 662 (holding failure to turn over *Brady* material "after prosecutorial phase" of case had begun was covered by absolute prosecutorial immunity); *Carter* v. *Burch*, 34 F.3d 257, 262 (4th Cir. 1994) (holding absolute immunity protects prosecutor from liability for failing to give defense counsel materially exculpatory evidence).

Vander, however, has not met his burden of establishing that absolute immunity protects him from potential liability for the other instances of misconduct alleged by Moore. Intimidating and coercing witnesses into changing their testimony is not advocatory. It is rather a misuse of *investigative* techniques legitimately directed at exploring whether witness testimony is truthful and complete and whether the government has acquired all incriminating evidence. It therefore relates to a typical police function, the collection of information to be used in a prosecution. *See, e.g., Barbera* v. *Smith*, 836 F.2d 96, 100 (2d Cir. 1987) (holding "*acquiring* evidence which might be used in a prosecution," in contradistinction to "*organization, evaluation*, and *marshalling*" of such evidence, is activity of "police nature" and is therefore not entitled to absolute protection) (emphasis original). "When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" *Buckley*, — U.S. at —, 113 S. Ct. at 2616 (quoting *Hampton* v. *Chicago*, 484 F.2d 602, 608 (7th Cir. 1973), *cert. denied*, 415 U.S. 917, 94 S. Ct. 1413, 1414, 39 L. Ed. 2d 471 (1974)).[7]

Finally, disclosing grand jury testimony to unauthorized third parties is not advocatory because it

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[7] And as the Supreme Court explained:

> A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as "preparation" for a possible trial. . . . When the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same.

Buckley, — U.S. at — , 113 S. Ct. at 2617.

has no functional tie to the judicial process—it does not contribute to the government's case before a grand or petit jury. Like making statements at a press conference, unauthorized disclosure "does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions." *Buckley*, 509 U.S. at ——, 113 S. Ct. at 2618.[8]

B. *Claims Against the Postal Inspectors*

The district court dismissed Moore's claims against the postal inspectors because Moore's complaint did not allege direct evidence that they acted maliciously or in retaliation for constitutionally protected speech. Reviewing the dismissal *de novo* and taking the facts as alleged in Moore's complaint, *Kowal*, 16 F.3d at 1276, 1273, we affirm the dismissal of the malicious prosecution claim but hold that the district court erred in dismissing Moore's retaliatory prosecution claim.[9]

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[8] While we conclude that absolute immunity does not protect Valder, he of course would be entitled to any qualified immunity available to the postal inspectors. Qualified immunity protects a government official who performs discretionary functions from liability for civil damages if he can show that his actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982).

[9] As an initial matter, we reject Moore's argument that the district court here was precluded from reconsidering the Texas district judge's conclusion that Moore had "asserted a set of facts supporting each claim that, if found to be true regarding the element of malice, would overcome defendants' qualified immunity defense and entitle him to relief." JA 343-44. We first observe that the Texas district judge should not have ruled on the immunity issue because he found that he lacked personal jurisdiction over

The district court did not address whether Moore's *Bivens* claims alleged the violation of clearly established law.[10] The court, therefore, "erred in deciding the heightened pleading issue before deciding the *threshold* 'essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.'" *Kartseva* v. *Department of State*, 37 F.3d 1524, 1530 (D.C. Cir. 1994) (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991) (emphasis original)). Furthermore, it has not been clearly established that malicious prosecution violates any constitutional or statutory right.[11] Accordingly, the postal

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the postal inspectors. More importantly, we iterate that the district court below is bound to follow the law of *this* circuit. *See, e.g., 1B Moore's Federal Practice* ("The district courts owe obedience, each to the court of appeals in its own circuit. It may happen, therefore, that a decision in the transferor court is in accordance with the view of the law as established by the court of appeals in its own circuit, but in the transferee circuit the law is either unsettled, or settled to the contrary. . . . If the issue has been settled . . . the transferee court finds itself suspended between the doctrine of stare decisis and the doctrine of the law of the case. In such a circumstance the transferee court would invite reversal if it did not follow the decisions of its own court of appeals.").

[10] The parties appear to agree that prosecution in retaliation for speech protected by the first amendment violates a clearly established right. *See infra* note 12. Although the parties disputed whether the malicious prosecution claim survived the qualified immunity defense, the district court expressly found that it "need not address the question" because of its ruling that Moore's allegations were otherwise deficient. JA 355.

[11] *See Sami* v. *United States*, 617 F.2d 755, 773 (D.C. Cir. 1979) (citing with approval cases holding that "it takes more than a false arrest or malicious prosecution claim to rise to the dignity of a constitutional violation"); *see also McLaughlin* v. *Alban*, 775 F.2d 389, 392 (D.C. Cir. 1985) (concluding that plaintiff must "show not

inspectors' qualified immunity defeats Moore's malicious prosecution claim. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. Moore's *retaliatory* prosecution claim, however, does allege the violation of clearly established law.[12]

In publicly criticizing the USPS Moore unquestionably exercised his first amendment rights. Record evidence manifests that the criticism produced hostility in USPS management. Joint Appendix (JA) 154-156, 283. Two of the postal inspectors, who reported to

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merely a mistaken prosecution or even a common law tort, but the violation of a constitutional right" to establish section 1983 claim); *Torres* v. *Superintendent of Police of Puerto Rico*, 893 F.2d 404, 409 (1st Cir. 1990) (holding section 1983 provides remedy only if plaintiff proves elements of malicious prosecution under state law and establishes that misuse of the legal proceedings was so egregious that he suffered deprivation of rights secured by fourteenth amendment) (citations omitted).

[12] *See, e.g.*, *Haynesworth* v. *Miller*, 820 F.2d 1245, 1255-57 (D.C. Cir. 1987) (agreeing that "retaliatory prosecution [allegedly initiated solely because plaintiff refused to release civil claims of police misconduct against arresting officers] constitutes actionable First Amendment wrong"); *see also Norwell* v. *Cincinnati*, 414 U.S. 14, 16, 94 S. Ct. 187, 188, 38 L. Ed. 2d 170 (1973) (per curiam) (finding first amendment violation in retaliatory prosecution for "nonprovocatively voicing [] objection" to police conduct); *DeLoach* v. *Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) ("An act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper.") (quoting *Matzker* v. *Herr*, 748 F.2d 1142, 1150 (7th Cir. 1984)); *Magnotti* v. *Kuntz*, 918 F.2d 364, 368 (2d Cir. 1990) ("It is undisputed that retaliatory prosecution may expose a state official to section 1983 damages."); *Losch* v. *Parkesburg*, 736 F.2d 903, 907-08 (3d Cir. 1984) ("[I]nstitution of criminal action to penalize the exercise of one's First Amendment rights is a deprivation cognizable under § 1983.") (citing *Wilson* v. *Thompson*, 593 F.2d 1375, 1377 (5th Cir. 1979)).

USPS management, heard and did not repudiate Valder's declaration that Moore's innocence was irrelevant to the prosecution he intended to pursue. JA 32. These facts taken together constitute evidence sufficient to meet any applicable heightened pleading standard[13] and, accordingly, we remand Moore's retaliatory prosecution claim against the postal inspectors.

C. *Claims Against the United States*

The district court dismissed Moore's FTCA claims for lack of subject matter jurisdiction, holding that the alleged misconduct fell within the FTCA's "discretionary function" exception. We review the dismissal *de novo* but construe Moore's allegations in his favor. *Hohri* v. *United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987).[14] We hold that only some of the alleged misconduct is covered by the exception.

The FTCA waives the sovereign immunity of the United States from suits for negligent or wrongful acts of government employees subject to certain exceptions. *See* 28 U.S.C. §§ 2671-2680. The "discretionary function" exception protects the federal government from liability for "[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal

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[13] In *Kartseva* v. *Department of State*, 37 F.3d 1524, 1530-31 (D.C. Cir. 1994), we explained this circuit's two-level heightened pleading standard.

[14] Because we accept Moore's version of the facts, we reject his argument that the district court should not have decided whether the discretionary function exception applied without permitting Moore an opportunity to conduct discovery and develop a "concrete record."

agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The exception "preserves the preexisting cloak of governmental immunity for some category of activities." *Gray* v. *Bell*, 712 F.2d 490, 508 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100, 104 S. Ct. 1593, 80 L. Ed. 2d 125 (1984). We "must examine carefully the allegations made to determine whether they are sufficiently separable from protected discretionary decisions. If such separability exists, then the conduct of the prosecutor may be actionable under the FTCA." *Id.* at 515. But where the "allegation of improper investigatory conduct is inextricably tied to the decision to prosecute and the presentation of evidence to the Grand Jury," the discretionary function applies and preserves governmental immunity. *Id.* at 516.

Deciding whether to prosecute, assessing a witness's credibility to ensure that he is giving an accurate and complete account of what he knows, identifying the evidence to submit to the grand jury and determining whether information is "exculpatory" and "material" and therefore must be disclosed pursuant to a *Brady* request[15] are actions that require the prosecutor to exercise his professional judgment. They are there-

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[15] We recognize that internal regulations of the Department of Justice direct that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." Department of Justice Manual, 9-11.233 (October 1, 1990). Putting aside the question whether this regulation creates any enforceable right, we note that deciding what this regulation requires under a specific set of circumstances is itself a discretionary act.

fore quintessentially discretionary.[16] Accordingly, the United States enjoys immunity from Moore's claims that Valder and the postal inspectors pressured witnesses into incriminating him, concealed and distorted exculpatory evidence to create a false impression of what he knew about the fraud schemes and withheld material exculpatory information from him after the grand jury returned an indictment.

Disclosing grand jury testimony to unauthorized third parties, however, is *not* a discretionary activity nor is it inextricably tied to matters requiring the exercise of discretion. Rather, it is a discrete activity, sufficiently separable from protected discretionary decisions to make the discretionary function exception inapplicable to this allegation. We express no view whether the allegation is otherwise cognizable under the FTCA or whether it is supported by the evidence.

We therefore affirm in part, reverse in part and remand to the district court for proceedings consistent with this opinion.

So ordered.

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[16] We are guided by our decision in *Gray* where we held that allegations that the defendants "deliberately present[ed] false and misleading evidence to and with[held] exculpatory evidence from the Grand Jury" are within the discretionary function exception because they are "insufficiently separable from the discretionary decision to initiate prosecution." 712 F.2d at 495, 516.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 92-2288 (NHJ)

WILLIAM G. MOORE, JR., ET AL., PLANTIFFS

v.

MICHAEL HARTMAN, ET AL., DEFENDANTS

Civ. A. No. 93-0324 (NHJ)

WILLIAM G. MOORE, JR., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

Sept. 24, 1993

MEMORANDUM OPINION

NORMA HOLLOWAY JOHNSON, District Judge.

These two actions against the United States arise from a major criminal investigation and subsequent prosecution carried out by the office of the United States Attorney for the District of Columbia. The plaintiffs allege that the government and its agents intentionally misled a grand jury, concealed exculpatory evidence, intimidated witnesses, and falsified statements in an attempt to convict plaintiff William Moore. The United States has filed motions to dismiss in both cases.

BACKGROUND

In ruling on a motion to dismiss, the Court must treat the allegations of the complaint as true. *Shear* v. *National Rifle Ass'n*, 606 F.2d 1251, 1253 (D.C. Cir. 1979). The facts as set forth in the complaints are as follows: in early 1985, the U.S. Postal Inspection Service began an investigation into possible illegal payments from John Gnau, a consultant, to Peter Voss, then a member of the United States Postal Service Board of Governors. Assistant United States Attorney Joseph Valder eventually came to lead the investigation. Voss, Gnau, and another member of Gnau's consulting firm pled guilty to criminal charges, while other participants in the conspiracy agreed to cooperate in exchange for immunity from prosecution. Compl. (Civil No. 93-0324) at 6-7.

Plaintiff William Moore was at this time chief executive officer of Recognition Equipment, Inc. ("REI"), a corporation that was seeking to obtain a contract with the Postal Service for the sale of multiple-line optical character recognition ("MLOCR") equipment. At the suggestion of Governor Voss, REI had retained Gnau's consulting firm in order to improve REI's chances of obtaining the contract with the Postal Service. *Id.* As the investigation of Voss and Gnau progressed, Valder and the Postal Inspectors allegedly tried to find a way to link Moore to the conspiracy. However, the evidence clearly demonstrated that Moore knew nothing of the conspiracy. In fact, several conspirators told Valder and the Inspectors that they had actively sought to conceal the conspiracy from Moore. *Id.* at 7.

Nevertheless, Valder and the Inspectors allegedly "engaged in unusual, unlawful and unconstitutional

investigative techniques to intimidate and coerce witnesses to try to implicate Moore and to control the flow of information to the Grand Jury in order to mislead the Grand Jury to return an indictment when none was warranted." *Id.* at 8. Valder and the Inspectors are alleged to have presented incomplete witness statements to the grand jury, even though the witnesses themselves had said that the statements were inaccurate. Valder and the Inspectors are alleged to have intimidated witnesses, going so far as to tear up the immunity letter of one witness in his presence while threatening to prosecute his son. Moore also claims that the defendants failed to provide him with exculpatory evidence that should have been disclosed under *Brady* v. *Maryland*, 373 U.S. 83 (1963), evidence including the report of a lie detector test and a witness statement containing exculpatory statements.

On October 6, 1988, a federal grand jury in the District of Columbia issued an indictment naming Moore, REI, and Robert Reedy, an employee of REI. The indictment charged the defendants with one count of conspiracy to defraud the United States, 18 U.S.C. § 371; one count of theft, 18 U.S.C. §§ 2, 1707; one count of receiving stolen property, D.C. Code Ann. §§ 22-3832(a), (c)(1), 22-105; two counts of mail fraud, 18 U.S.C. §§ 2, 1341; and two counts of wire fraud, 18 U.S.C. §§ 2, 1343. The substance of the charges was that the defendants had illegally conspired to influence the Postal Service's decision whether to award a contract to REI. According to the indictment, REI, Moore, and Reedy paid Gnau for lobbying services, and Gnau in turn paid Governor Voss to take illegal actions on REI's behalf. The indictment also alleged that the defendants had hatched a scheme to replace then-

Postmaster General Paul Carlin with a person more sympathetic to REI's interests.

The government presented its case during a six-week bench trial before the Honorable George Revercomb of the United States District Court for the District of Columbia. On November 20, 1989, following the close of the government's evidence, Judge Revercomb granted the defendants' motion for judgment of acquittal on all charges. *See United States* v. *Recognition Equipment, Inc.*, 725 F. Supp. 587 (D.D.C. 1989). In his opinion, Judge Revercomb specifically noted that "no evidence has been presented that REI, Moore, or Reedy knew of this criminal scheme." *Id.* at 590. Nevertheless, as a result of his indictment and prosecution, Moore maintains that his career was seriously compromised and his finances decimated. He was twice fingerprinted and processed by law enforcement officers and briefly jailed. He and his wife allege that they suffered humiliation, physical and mental suffering, and anguish, which required them to undergo medical treatment.

PROCEDURAL HISTORY

A. Civil Action No. 92-2288

On November 19, 1991, Moore and his wife, Blanche K. Moore, filed a complaint in the United States District Court for the Northern District of Texas against Valder and the seven Postal Inspectors who investigated the case against Moore. The complaint sought to recover for various constitutional violations under a *Bivens* theory of liability,[1] as well as for the state common-law torts of slander, defamation, invasion

[1] *See Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

of privacy, false arrest, abuse of process, and malicious prosecution. In response to the assertion of state law claims against Valder and the Inspectors, the Attorney General's designee certified, on February 18, 1992, that all of the claims against the individually named government defendants arose from actions carried out within the scope of their employment. The Texas federal district court then ordered that the United States was to be substituted as the defendant with respect to the state law claims pursuant to 28 U.S.C. § 2679(d)(1). The state law claims against the individual defendants were dismissed with prejudice.

On September 21, 1992, the Texas federal district court issued an order ruling on the defendants' motion to dismiss. The order dismissed all constitutional claims brought by Blanche Moore, all of Moore's constitutional claims against Valder, and several of Moore's constitutional claims against the Inspectors. The Texas court refused, however, to grant the defendants' motion to dismiss with respect to Moore's malicious prosecution claim against the Inspectors, as well as the constitutional claim alleging violation of his First Amendment rights. Moreover, the court also concluded that it lacked personal jurisdiction over the Inspectors and transferred the case rather than dismiss the remaining claims against them. On October 5, 1992, the official record was transferred to this court and docketed as Civil Action No. 92-2288. The defendants moved to dismiss for lack of jurisdiction, to dismiss the Inspectors as defendants, and to vacate the portion of the Texas district court's ruling that permitted claims to go forward against the Inspectors. A motion for entry of default judgment against the United States was also filed.

B. Civil Action No. 93-0324

On October 14, 1992, the plaintiffs filed a second lawsuit in the United States District Court for the Northern District of Texas. This second complaint named only the United States as a defendant, and differed from the first primarily in that (1) it alleged exhaustion of the administrative remedy procedure which is a prerequisite to filing suit under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, and (2) it alleged no cause of action for defamation or for invasion of privacy. On February 16, 1993, the official record was formally transferred to this Court, where it was docketed as Civil Action No. 93-0324. The United States has filed a motion to dismiss for lack of subject matter jurisdiction.

DISCUSSION

A. The *Bivens* Claims Against the Inspectors Do Not Satisfy This Circuit's Heightened Pleading Standard

In ruling on the defendants' motion to dismiss in Civil No. 92-2288, the Texas federal district court declined to dismiss two claims that Moore had brought against the Inspector defendants in their individual capacities: (1) the malicious prosecution claim, and (2) the claim that the Inspectors had violated Moore's First Amendment rights. The defendants argue that these claims should be dismissed because Moore has failed to allege them with sufficient particularity to satisfy this circuit's heightened pleading standard in *Bivens* actions.[2]

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[2] The parties also dispute whether a malicious prosecution claim can rise to the level of a constitutional tort. Normally it does not: "it takes more than a false arrest or malicious prosecution claim to rise to the dignity of a constitutional violation." *Sami* v.

The Supreme Court has determined that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-18 (1982). To this end, the Court of Appeals for this Circuit has developed a heightened pleading standard for *Bivens* claims alleging an unconstitutional motive. A *Bivens* plaintiff may not merely "allege facts consistent with lawful conduct and append a claim of unconstitutional motive," because to permit such a lawsuit to proceed would "impos[e] on officials the very costs and burdens of discovery and trial that *Harlow* intended to spare them." *Siegert* v. *Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991). Instead,

> Where the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for pretrial judgment based on a showing of the objective reasonableness of his actions, then plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some direct evidence that the officials' actions were improperly motivated must be produced if the case is to proceed to trial.

United States, 617 F.2d 755, 773 (D.C. Cir. 1979). Yet if, as Moore argues, his malicious prosecution count does indeed allege a constitutional violation, then his allegations of malice must still meet this circuit's heightened pleading standard for *Bivens* actions. Because the Court has determined that Moore's allegations of malice do not meet this standard, the Court need not address the question of whether his malicious prosecution claim states a cause of action under the Constitution.

Martin v. *D.C. Metro. Police Dep't*, 812 F.2d 1425, 1435 (D.C. Cir. 1987). To survive the Inspectors' motion to dismiss, therefore, Moore must produce direct evidence showing that the Inspectors acted out of malice. Evidence that merely supports an inference of malice is insufficient.

According to Moore, "[t]he Complaint alleges that the prosecution against Moore was initiated for at least two reasons. First, Moore was being punished for his aggressive lobbying of the USPS and important members of Congress in order to persuade the USPS to adopt REI's MLOCR technology. . . . Second, . . . [they] sought to prosecute Moore for suggesting qualified candidates for the position of Postmaster General." Pls.' Opp'n to Inspectors' Mot. to Dismiss at 17. Moore claims to have offered some six sources of direct evidence to support these allegations: (1) the complaint itself, (2) the indictment in Moore's criminal case, (3) the testimony of Frank Bray at Moore's criminal trial, (4) Judge Revercomb's opinion entering a judgment of acquittal, (5) Moore's own affidavit, and (6) an affidavit executed by William Hittinger, a member of REI's board of directors.

The first five of these sources provide only inferential proof of malice. The complaint, for example, alleges that Moore lobbied Congress and the Postal Service and that he recommended a candidate for the position of Postmaster General. Its strongest allegation of malicious intent, however, is contained in paragraph 16, which alleges that the defendants used unlawful investigative techniques

> with malice and in clear violation of Moore's right to a fair investigation; these activities were done by

> defendants in an attempt to obtain publicity for themselves and seek career advancement; and these unlawful activities were done by defendants in an attempt to "punish" Moore for exercising his constitutionally-protected rights to criticize USPS procurement decisions.

Compl. at 9. This allegation is insufficient under *Martin* because it does not identify facts that would be direct evidence of malicious intent. Such direct evidence might include, for example, specific statements or documents that expressly set forth the defendants' intent. *See, e.g., Hobson* v. *Wilson*, 737 F.2d 1, 10 (D.C. Cir. 1984) (complaint referred to specific memoranda admitting that defendants' express purpose was to disrupt plaintiffs' political activities), *cert. denied*, 470 U.S. 1084 (1985); *see also Earley* v. *Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990) (defining "direct evidence" as "evidence which, if believed, would prove the existence of a fact in issue *without inference or presumption*"). Because the complaint does not contain such evidence or offers of proof, it cannot serve to overcome a qualified immunity defense.

Nor do the indictment or Judge Revercomb's opinion advance Moore's case. These documents confirm that Moore lobbied Congress and the Postal Service, but they do not provide direct evidence that he was prosecuted because of his lobbying activities. Bray's testimony and Moore's own affidavit go one step further; they show that animosity existed between some REI employees and some employees of the Postal Service. Bray, for example, testified at trial that there was a "stubborn resistance" at the Postal Service to REI's attempts to promote MLOCR technology, and said he worried that Moore's "aggressive lobbying effort . . .

might alienate the feelings" of some Post Office leaders. Trial Tr. (Ex. E to Appendix to Pls.' Opp'n to Mot. to Dismiss, filed Apr. 14, 1992) at 1718, 1731. According to Moore, the Postal Service had a "personal animus" against him and seemed "determined to exact . . . punitive measures directed at me personally." Aff. of William G. Moore (Ex. B to Appendix to Pls.' Opp'n to Mot. to Dismiss, filed Apr. 14, 1992) at 29-30. Even these statements do not, however, show that this alleged animosity was a motivating factor in the Inspectors' decision to investigate and prosecute Moore. The closest they come is Moore's statement that "I believe that the agents were motivated in large measure by animus towards me and my company born of longstanding conflict between [REI] and various senior managers within the USPS." *Id.* at 1. This sweeping claim relies entirely upon Moore's subjective beliefs and refers to no direct or circumstantial evidence of the defendants' intent. This claim therefore cannot serve to meet the required heightened pleading standard for *Bivens* actions.

Indeed, the only direct evidence of intent that Moore has offered is the Hittinger affidavit. In this affidavit, a member of REI's board of directors describes how he traveled to Washington in 1987 or 1988 in order to testify before a grand jury and had lunch with Valder and two Postal Inspectors on the day of his testimony. During their conversation, "Mr. Valder stated in substance that the merits of the case or whether the persons involved were guilty or not did not conc[illegible]n him. He explained that it was important to him that he win the case because he wanted to get a track record or some notoriety which would help him obtain a good position in private practice." Aff. of William C.

Hittinger (Ex. B to Pls.' Opp'n to Mot. to Dismiss, filed Mar. 5, 1993) at 3. Even this direct evidence, however, cannot save Moore's claims against the Inspectors from dismissal for it provides no evidence of the Inspectors' intent. Nothing in the affidavit suggests that the Inspectors shared Valder's alleged motivations.

Moore has completely failed to offer any direct evidence of malicious intent by the Inspectors. Moore has urged the Court to adopt a less stringent reading of the heightened pleading standard, *i.e.*, a reading set forth in *Kimberlin* v. *Quinlan*, 774 F. Supp. 1 (D.D.C. 1991), *appeal filed*, No. 91-5315 (D.C. Cir. Aug. 30, 1991). *Kimberlin* involved a federal prisoner who alleged that prison officials had placed him in detention to keep him from speaking to the news media about his claims that he had sold marijuana to vice-presidential candidate Dan Quayle. The trial judge in *Kimberlin* examined *Siegert* and other cases dealing with the heightened pleading standard and concluded that "*Siegert* does not appear to have turned on the distinction between direct and circumstantial evidence as understood in the law of evidence, but on the question whether the plaintiff had proffered something other than mere conclusions." He then held that the *Bivens* plaintiff did not have to allege direct evidence of intent but could instead survive dismissal with "tangible allegations of concrete facts corroborative of his own subjective version of the events." *Id.* at 6. Moore argues that under this standard his case should proceed to discovery, because he has alleged facts which "raise[] a legitimate inference that someone was out to 'get' Bill Moore." Pls.' Opp'n to Inspectors' Mot. to Dismiss at 19.

The Court declines to follow *Kimberlin*. Moore's allegations, by contrast to those in *Kimberlin*, rely upon questionable logic and create no strong inferences of unconstitutional motive. The chain of inferences Moore has constructed can be summarized as follows: (1) Moore suggested candidates for the office of Postmaster General, (2) he lobbied Congress and the Postal Service to adopt MLOCR technology, (3) his efforts angered some officials at the Postal Service, and (4) Valder and the Inspectors attempted to silence him by pursuing an unwarranted prosecution. Although this scenario is within the realm of possibility, it essentially relies upon a *post hoc ergo propter hoc* theory of causation—because the lobbying came before the prosecution, the lobbying must have caused the prosecution. Moore is unable to explain why the Inspectors would have cared about a private citizen's criticism of Postal Service procurement procedures. Nor does he reveal why the Inspectors would have preferred that the Postal Service use single-line optical character recognition equipment instead of REI's multiple-line equipment. In *Kimberlin*, by contrast, the defendants were high-ranking executive branch officials, appointed during Republican administrations, who might naturally have been intensely interested in the outcome of a presidential election. Indeed, *Kimberlin* showed that the defendants were in close contact with the Quayle campaign, and that their high-level decision to place a single inmate in detention was unprecedented and extraordinary. The court rightly concluded that Kimberlin's allegations were "tangible, detailed, and nonconclusory." 774 F. Supp. at 8. Moore, however, alleges only that the Postal Service bore him animosity and then asks that an inference be drawn that this animosity caused his prosecution. This link is far too

tenuous to satisfy even the standard set forth in *Kimberlin*.

Finally, Moore objects to this Court's review of the Texas court's order which held that Moore had met his pleading burden on his claims against the Inspectors. That order denied the defendants' motion to dismiss the claims, and declared that "[d]iscovery should therefore proceed on both of these claims." Mem. Ord. of Sept 21, 1992 at 10-11. The Court must review this earlier order, however, because the heightened pleading standard for *Bivens* actions in this Circuit is markedly different from the standard in the Fifth Circuit. *Compare Martin* v. *D.C. Metro. Police Dep't*, 812 F.2d 1425, 1435 (D.C. Cir. 1987) (requiring "direct evidence" of malice) with *Elliott* v. *Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985) (requiring only that a plaintiff "alleg[e] with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained."). Furthermore, the Court notes that revision of the Texas court's decision is entirely proper. *See* 1B James W. Moore et al., *Moore's Federal Practice* ¶ 0.404[4.-1] at II-9 to -10 (1993) ("[T]here are innumerable . . . orders and rulings that the district court may make as a case moves from the filing of the complaint to trial and judgment. All of these decisions are interlocutory in character, and remain subject to reconsideration and change at any time until the entry of judgment."); *cf.* Fed. R. Civ. P. 54(b) (providing, as to multiple claim or multiple party cases, that "[i]n the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer

than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties"). The Texas court did find that it lacked personal jurisdiction over the Inspectors. *See Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982) ("The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties."). The Court will accordingly vacate the portion of the Texas court's order that permitted discovery to proceed against the Inspectors and will dismiss the complaint against the Inspectors in Civil No. 92-2288 because Moore has failed to meet the heightened pleading standard for *Bivens* actions.

C. The United States Has Not Waived Its Sovereign Immunity with Respect to Constitutional Torts

Because the Inspectors are the only remaining individual defendants in these two lawsuits, after their dismissal only the claims of Moore and his wife against the United States survive. In Civil No. 92-2288, these claims are limited to the plaintiffs' common law claims for slander, defamation, invasion of privacy, false arrest, abuse of process, and malicious prosecution. In Civil No. 93-0324, however, the plaintiffs seek recovery for both common law torts and alleged constitutional violations. Counts I, II, and III of the complaint in Civil No. 93-0324 seek damages for malicious prosecution, false arrest, and abuse of process. Counts IV, V, and VI of the complaint seek damages for violations of the First and Fifth Amendments to the United States Constitution.

The FTCA, however, exposes the United States to liability only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Courts have interpreted this phrase to mean that only claims brought under state law are cognizable under the FTCA. *See, e.g., Meyer* v. *Fidelity Sav.*, 944 F.2d 562, 568 (9th Cir. 1991) ("Because 'the constitutional tort is a child of federal law, the United States is not liable for such torts under the Federal Tort Claims Act.'"). The Court will accordingly dismiss counts IV, V, and VI of the complaint in Civil No. 93-0324, because these counts state constitutional causes of action to which the United States has not waived its sovereign immunity.

D. The Claims Against the United States Are Barred by the Discretionary Function Exception to the Federal Tort Claims Act

The only claims remaining, therefore, are the common law causes of action against the United States. Both lawsuits seek relief on substantially the same grounds; the only difference is that Civil No. 93-0324 alleges satisfaction of the administrative remedy procedure under the FTCA, while Civil No. 92-2288 does not.[3] These grounds, as summarized by the plaintiffs themselves, are allegations that the government

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[3] Failure to exhaust this procedure provides an alternative ground for dismissal of Civil No. 92-2288. *See Mittleman* v. *United States Treasury*, 773 F. Supp. 442, 454 (D.D.C. 1991). Because the claims in the two cases are virtually identical, however, the Court devotes most of its analysis to the discretionary function exception, which applies to both cases.

1. Knowingly concealed evidence that Moore lacked knowledge of the conspiracy;

2. Presented false, incomplete, and misleading witness statements to the grand jury;

3. Refused to allow witnesses to amend these misleading statements after the witnesses pointed out that the statements were inaccurate;

4. Intimidated and harassed witnesses;

5. Falsified records of witness interviews by excluding exculpatory material from them; and

6. Withheld and possibly destroyed exculpatory evidence that should have been disclosed to Moore under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

See Pls.' Opp'n to Mot. to Dismiss at 7-8. The government contends that claims arising from these actions are barred by the discretionary function exception to the FTCA.

The FTCA waives the United States' sovereign immunity from suits for negligent or wrongful acts of Government employees, subject to certain exceptions set forth in 28 U.S.C. § 2680. The "discretionary function" exception provides that the government is not liable for

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the

> Government, whether or not the discretion involved be abused.

Id. § 2680(a). In *Gray* v. *Bell*, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), the court held that decisions to initiate prosecution are "quintessential examples of governmental discretion" and are therefore immune under this exception. *Id.* at 513. With respect to allegations of illegal pre-indictment conduct, courts are cautioned to "examine carefully the allegations made to determine whether they are sufficiently separable from protected discretionary decisions. If such separability exists, then the conduct of the prosecutor may be actionable under the FTCA." *Id.* at 515. Although the plaintiffs seek to recover for many alleged instances of misconduct, their claims fall into three categories: (1) those relating to the presentation of evidence to the grand jury, (2) those claiming that the government failed to disclose *Brady* material, and (3) those alleging that the government harassed and intimidated witnesses. Each of these actions, however, is closely linked to the exercise of prosecutorial discretion.

The court in *Gray* expressly identified "the presentation of evidence to the Grand Jury" as involving the sort of "purely discretionary decisions" that § 2680(a) was intended to protect. 712 F.2d at 515-16. The plaintiffs claim, nevertheless, that the government should be held liable for failing to present exculpatory evidence to the grand jury.[4] The Court notes first that

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[4] The plaintiffs also allege that the government "falsified" evidence. Pls.' Opp'n to Mot. to Dismiss at 8. A review of the complaint, however, shows that this alleged falsification did not involve the actual fabrication of evidence, but instead merely refers to the government's failure to include exculpatory evidence in witnesses'

in *United States* v. *Williams*, 112 S. Ct. 1735, 1744-46 (1992), the Supreme Court held that the government is under no duty whatsoever to present exculpatory evidence to a grand jury. In deciding *Williams* the Court overruled a number of contrary holdings by other federal courts, including Judge Revercomb's declaration, in Moore's criminal case, that a prosecutor may not "hide evidence that clearly negates guilt from the grand jury." *United States* v. *Recognition Equipment, Inc.*, 711 F. Supp. 1, 12 (D. D.C. 1989).

More relevant to our inquiry here, however, is the nature of a prosecutor's determination that a given item of evidence is "exculpatory." Judge Revercomb also observed that if prosecutors were forced to justify all their evidentiary decisions, "nearly every indictment would be vulnerable to charges that the prosecutor failed to submit each and every scrap of evidence, circumstantial or direct, that arguably could have worked in favor of the defendant." *Id.* at 11-12. This is precisely the sort of conduct that the discretionary function exception to the FTCA was intended to prevent. Exculpatory evidence does not come labeled as such. Instead, the decision whether to submit evidence to a grand jury on the grounds that it is "exculpatory" calls invariably for an exercise of discretionary judgment rooted in policy concerns. Such decisions are therefore inextricably "intertwined with purely discretionary decisions of the prosecutors," *Gray*, 712 F.2d at 515, and

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statements—the same conduct of which the plaintiffs complain elsewhere. Thus, all of the plaintiffs' claims relating to the presentation of evidence implicate the prosecutor's discretion to determine what evidence is exculpatory and what evidence is not.

cannot form the basis of a cause of action against the United States.[5]

The plaintiffs' claim that the government should be held liable for failing to disclose *Brady* material must be rejected for the same reason. In *Brady* v. *Maryland*, 373 U.S. 83 (1963), the Supreme Court held that a prosecutor has a duty to disclose, upon request, all exculpatory evidence which is material either to guilt or to punishment. Although courts have reviewed evidence in the criminal context to determine whether it falls within the scope of *Brady*, this does not mean that they can or should do so in the context of a civil tort action. No mechanical formula exists for determining whether evidence is exculpatory. Government agents would be hampered in their decisionmaking if the government could be held liable because they made a faulty "judgment call." Congress created the discretionary function exception in recognition of this fact.

Finally, the plaintiffs' allegation that the government "intimidated and harassed witnesses" also implicates actions that are closely linked to prosecutorial discretion. The conduct to which the plaintiffs refer here is the government's alleged attempt to "coerce incrimi-

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[5] The plaintiffs argue that the decision whether to disclose exculpatory evidence was not discretionary because the *United States Attorneys' Manual* states that a "prosecutor must . . . disclose such evidence to the grand jury." The plaintiffs argue that this creates a mandatory duty, and that the discretionary function exception therefore does not apply. *See Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). This argument, however, ignores the plain declaration in the *Manual* itself that the *Manual* "provides only internal Department of Justice guidance" and "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." *See* Appendix A to Defs.' Reply.

nating testimony" from a witness by tearing up his immunity letter in front of his face and by threatening to prosecute his son. *See* Compl. (Civil No. 93-0324) at 10-11. In *Gray*, however, the Court of Appeals established that "[p]rosecutorial decisions as to whether, when and against whom to initiate prosecution are quintessential examples of governmental discretion in enforcing the criminal law, and, accordingly, courts have uniformly found them to be immune under the discretionary function exception." 712 F.2d at 513. To hold the government liable because it threatened to prosecute a witness's son would be to second-guess its decision about "whether, when and against whom to initiate prosecution," a decision that is clearly committed to its sole discretion. Similarly, the decision whether to grant or deny immunity to a witness is also closely linked to the decision whether to prosecute that witness. Whether these decisions were made with malicious intent is irrelevant, as § 2680(a) preserves the government's sovereign immunity "whether or not the discretion involved be abused." Thus, neither of these actions can support a claim for damages against the United States.[6]

The discretionary function exception thus exempts the United States from liability for all the common law claims alleged in both of the plaintiffs' lawsuits. Having

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[6] The plaintiffs also argue that *Gray* does not apply to the Postal Inspectors' actions independent of the actions of prosecutor Valder. *See* Pls.' Opp'n to Mot. to Dismiss at 19-21. The relevant inquiry, however, is not which federal official carries out a given action, but whether the action implicates a discretionary function. Furthermore, *Gray* clearly provides that the discretionary function exception applies "no matter whether the challenged decisions are made during the investigation or prosecution of offenses." 712 F.2d at 516.

concluded that the *Bivens* claims against the Inspectors and the constitutional claims against the United States must also be dismissed, the Court will accordingly enter an order dismissing both Civil No. 92-2288 and Civil No. 93-0324. All other pending motions in this case will be denied as moot. An appropriate order will issue.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-2288 (NHJ)

WILLIAM G. MOORE, JR., ET AL., PLANTIFFS

v.

MICHAEL HARTMAN, ET AL., DEFENDANTS

Civil Action No. 93-0324 (NHJ)

WILLIAM G. MOORE, JR., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Sept. 24, 1993

ORDER

For the reasons set forth in the memorandum opinion issued on this date, it is this 24th day of September, 1993,

ORDERED that the motions of the United States to dismiss for lack of jurisdiction in Civil No. 92-2288 and in Civil No. 93-0324 be, and hereby are, granted; it is further

ORDERED that the motion of the Inspector Defendants to dismiss in Civil No. 92-2288 be, and hereby is granted; it is further

ORDERED that all other pending motions in these consolidated cases be, and hereby are, denied as moot; and it is further

ORDERED that these consolidated cases be, and hereby are, dismissed.

/s/ NORMA HOLLOWAY JOHNSON
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:91-CV-2491-G

WILLIAM G. MOORE, JR., ET AL., PLAINTIFFS

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

Filed: Sept. 21, 1992

MEMORANDUM ORDER

Before the court is the motion of defendants Joseph B. Valder ("Valder"), Michael Hartman ("Hartman"), Frank Korman ("Korman"), Robert Edwards ("Edwards"), Pierce McIntosh ("McIntosh"), Daniel Harrington ("Harrington"), Norma Robbins ("Robbins"), other unnamed defendants, and the United States of America ("the government") (collectively "defendants") to dismiss the complaint of plaintiffs William G. Moore, Jr. ("Moore") and Blanche K. Moore ("Mrs. Moore") (collectively "plaintiffs") for failure to state a claim upon which relief can be granted, lack of personal jurisdiction, and improper venue. For the reasons stated below, the motion to dismiss all constitutional claims brought by Mrs. Moore against the defendants is granted; the motion to dismiss Moore's constitutional

claims against Valder is granted; the motion to dismiss Moore's constitutional claims against Hartman, Korman, Edwards, McIntosh, Harrington, Robbins, and other unnamed defendants is granted as to the fifth amendment/fair and impartial grand jury claim, but is denied as to the malicious prosecution and first amendment claims; and while there is merit in the motion to dismiss for lack of personal jurisdiction those claims which remain in the case, the court has elected to transfer, rather than dismiss, those claims.[1]

I. *BACKGROUND*

On November 19, 1991, the plaintiffs sued the defendants—an Assistant United States Attorney (Valder) and a number of present and former employees of the United States Postal Service (Hartmann, Kormann, Edwards, McIntosh, Harrington, Robbins and other unnamed defendants)—for $30 million in damages allegedly caused by their misconduct during the criminal investigation, and subsequent prosecution, of Moore —formerly the Chairman, President, and Chief Executive Officer of Recognition Equipment Incorporated.[2]

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[1] Plaintiffs' common law claims against the individual defendants for slander, defamation, invasion of privacy, false arrest, abuse of process, and malicious prosecution were dismissed with prejudice and are now being brought solely against the United States, as contemplated by 28 U.S.C. § 2679(d)(1). *Moore* v. *Valder, et al.*, 3-92-CV-2491-G (N.D. Tex. June 29, 1992) (order granting substitution of United States for individual defendants as to common law claims). The motion at issue here did not address these claims against the United States, and this court accordingly intimates no opinion concerning them. They will be transferred, however, to the District of Columbia so that all remaining claims may be adjudicated in one forum.

[2] *See United States* v. *Recognition Equipment, Inc.*, 725 F. Supp. 587 (D.D.C. 1989).

Plaintiffs contend that the defendants engaged in a pattern of tactics designed to mislead and abuse the grand jury process and to deprive both of them of constitutional rights. Specifically, plaintiffs have asserted constitutional claims against the defendants under the first, fourth and fifth amendments. On this motion, defendants maintain that (1) the court lacks in *in personam* jurisdiction over them; (2) venue is improper in this court; (3) the rights claimed by plaintiffs are not protected by the United States Constitution; (4) even if the claims asserted by Moore are of constitutional dimension, Mrs. Moore does not have a right of action cognizable under the Constitution; (5) the individual defendants are entitled to absolute immunity from suit; and (6) in the event the defendants are not absolutely immune from suit, they are nevertheless entitled to qualified immunity.

III. *ANALYSIS*

A. *Failure To State A Claim*

1. *Legal Standard*

A complaint need only recite a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a). The Federal Rules of Civil Procedure do not require factual pleading; plaintiffs may proffer general pleadings and defendants may discover the precise factual basis for the claims through liberal pretrial discovery procedures. *Morrison* v. *City of Baton Rouge*, 761 F.2d 242, 244 (5th Cir. 1985). A motion under Rule 12(b)(6) should be granted, however, only when it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claims that would entitle them

to relief. *Campbell* v. *Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir.), *cert. denied*, 476 U.S. 1159 (1986); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). The court must accept as true all well-pleaded facts in the complaint and construe the complaint liberally in favor of the plaintiffs. *Abdul-Alim Amin* v. *Universal Life Insurance Company of Memphis, Tennessee*, 706 F.2d 638, 640 (5th Cir. 1983). The court should also give the plaintiffs an opportunity to amend their complaint rather than dismiss if it appears that a more carefully drafted complaint might state a claim upon which relief may be granted. *Friedlander* v. *Nims*, 755 F.2d 810, 813 (11th Cir. 1985). *See also Dussouy* v. *Gulf Coast Investment Corporation*, 660 F.2d 594, 604 (5th Cir. 1981); *Sarter* v. *Mays*, 491 F.2d 675, 676 (5th Cir. 1974).

The court need not, however, assume facts that the plaintiffs have failed to allege. *Campbell*, above, 781 F.2d at 443. Nor must the court accept as true allegations which are wholly conclusory or which fail to set forth acts that, if proved, would warrant the relief sought. Dismissal of claims founded on such allegations is proper. *Davidson* v. *State of Georgia*, 622 F.2d 895, 897 (5th Cir. 1980).

2. *Standing of Mrs. Moore*

As a preliminary matter, the court agrees with the defendants that Mrs. Moore lacks standing to assert constitutional claims against them under the first and fifth amendments.[3] The Supreme Court has con-

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[3] Plaintiffs also alleged a fourth amendment claim, but they failed to respond to defendants' motion to dismiss that claim. Because the court is persuaded by defendants' arguments that the fourth amendment claim should be dismissed, and because plaintiff's failure to respond may fairly be deemed an abandonment

sistently held that rights under the first, fourth, and fifth amendments are personal and may not be vicariously asserted. *See, e.g., Rakas* v. *Illinois*, 439 U.S. 128, 133-34 (1978) (fourth amendment); *United States* v. *White*, 322 U.S. 694, 698 (1944) (fifth amendment). In response to the defendant's assertions, the plaintiffs present merely conclusory allegations —offering neither case law to refute the defendants' arguments nor facts to demonstrate that the government violated Mrs. Moore's constitutional rights. Because Mrs. Moore lacks standing, her constitutional claims must be dimissed.

3. *Immunity of Defendants*

a. *Valder*

The plaintiffs allege that Valder, in his capacity as an assistant U.S. attorney conducting a criminal investigation and subsequent prosecution, violated Moore's constitutional rights under the first and fifth amendments of the U.S. Constitution. A prosecutor enjoys absolute immunity from personal liability for his conduct "in initiating a prosecution and in presenting the [Government's] case." *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976). Where the actions giving rise to the claim for damages involve the prosecutor's role as an advocate, the prosecutor is immune from suit. *See Burns* v. *Reed*, ___U.S. ___, ___, 111 S. Ct. 1934, 1942 (1991); *Imbler*, 424 U.S. at 430-31. Absolute immunity extends to the conduct of prosecutors in presenting cases to grand juries. *Morrison* v. *City of Baton Rouge*, above, 761 F.2d at 246-49. Activity prior to the pres-

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of that claim, this opinion will discuss only plaintiff's first and fifth amendment claims.

entation of a case to the grand jury, including the interviewing of witnesses who will testify before the grand jury, is advocatory in nature, and as such, immunized from suit. *See Morrison*, above, 761 F.2d at 248; *Cook* v. *Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980). Even prosecutorial misconduct committed *maliciously or in bad faith* is protected by absolute immunity. *See, e.g., Brummett* v. *Camble*, 946 F.2d 1178, 1181 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2323 (1992); *Morrison*, 761 F.2d at 248. Absolute immunity is justified and defined by the governmental functions it protects and serves, not by the *motives* with which a particular officer performs those functions. *Brummett*, 946 F.2d at 1181.

According to Moore, Valder, in his relentless pursuit of Moore's indictment, "(1) tore up an immunity letter; (2) threatened a key witness with the prosecution of his son; (3) flew to Dallas to investigate the case; . . . (4) destroyed *Brady* material and made misrepresentations to the Court regarding the existence of *Brady* material"[4]; provided the other defendants with legal advice[5]; and (6) prosecuted Moore, in part, because Moore was publicly critical of the United States Postal Service ("USPS").[6] Such prosecutorial behavior, Moore contends, falls outside Valder's quasi-judicial role and should be considered investigatory or administrative in nature.

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[4] Plaintiffs' Surreply to Defendants' Reply to Plaintiffs' Response to Defendants' Motion to Dismiss (May 27, 1992) at 18.

[5] Plaintiff's Response to Defendants' Motion to Dismiss (April 14, 1992) at 32-33.

[6] Original Complaint ¶ 16; Plaintiff's Response, n.5 above, at 29.

Giving full weight to Moore's allegations, the court nevertheless concludes that Valder was performing judicial and quasi-judicial functions. All of Valder's conduct relevant to this case was preparatory to presenting a case against Moore to the grand jury. The face of the complaint compels the conclusion that all of the acts attributed to Valder wer prosecutorial functions—regardless of his motives, malice, or bad faith. Under clear circuit precedent, Valder was, at all times material here, acting as a prosecutor, and he is therefore personally immune from liability on these claims.[7] All remaining claims[8] against Valder are accordingly dismissed.

b. Postal Inspectors Hartman, Kormann, Edwards, McIntosh, Harrington, Robbins and other unnamed defendants ("Postal Service Employees")

The court agrees with Moore that the defendant postal service employees are not clothed with a derivative immunity that would make them absolutely immune from suit. *See Malley* v. *Briggs*, 475 U.S. 335, 340-44 (1986) (police officers); *Harlow* v. *Fitzgerald*, 457 US. 800, 810-11 (1982) (presidential aides). The court concludes, however, that the postal service employees may assert qualified immunity from suit on those claims, and issue which is addressed below.

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[7] Plaintiffs themselves recognize that "prosecutional [sic] immunity may be difficult to overcome" in this case, Plaintiffs' Surreply at 18, and that this circuit "has taken a rather expansive view of the scope of prosecutorial immunity." Plaintiffs' Response at 32.

[8] The nonconstitutional claims have already been dismissed. *See* note 1, above.

(i) *Fifth Amendment/Due Process/Grand Jury Claim*

Qualified immunity shields government officials performing discretionary functions from liability for civil damages if their actions could reasonably have been considered consistent with the rights they are alleged to have violated. This doctrine affords an "*immunity from suit* rather than a mere defense to liability." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original). The court must assess the objective legal reasonableness of their actions, in light of the rules that were clearly established at the time. The contours of Moore's rights must have been clear enough for a reasonable official to have understood that he was violating those rights. Thus, in light of the preexisting law, the unlawfulness of the defendants' acts must have been apparent. *Anderson* v. *Creighton*, 483 U.S. 635, 638-40 (1987); *Matherne* v. *Wilson*, 851 F.2d 752, 756-57 (5th Cir. 1988); *Hodorowski* v. *Ray*, 844 F.2d 1210, 1216-17 (5th Cir. 1988). The court must measure the "law's certainty" against "an objectively reasonable view of the facts facing an official." *Matherne*, 851 F.2d at 756. A balance must be struck between the interests of vindicating citizens' constitutional rights and of public officials' ability to effectively perform their duties. This balance is destroyed if officials cannot reasonably anticipate when their conduct may give rise to liability for damages. *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984). Therefore, to overcome defendants' qualified immunity defense, Moore must show that no reasonable postal inspector could have believed that the conduct complained of was lawful.

Moore alleges that the postal service employees engaged in a pattern of tactics designed to mislead and

abuse the grand jury process and to deprive him of his fifth amendment right to due process and to informed, fair, and impartial grand jury. All of these alleged acts arose out of the defendants' conduct in the preparation of evidence—both exculpatory and otherwise—for presentation to a grand jury. As defendants pointed out,[9] courts have disagreed in the past as to the conduct required of government officials when collecting and preparing evidence to place before a *grand jury*. Recently, in *United States* v. *Williams*, ___ U.S. ___, 112 S. Ct. 1735 (1992), the Court held that withholding exculpatory evidence from a grand jury does not violate a criminal defendant's constitutional right to an unbiased and independent grand jury. 112 S. Ct. 1744-45. At the time of the conduct alleged here, the law's uncertainty[10] concerning the procurement and presentation of evidence to the grand *jury* would have made it impossible for a reasonable official to have understood that he was violating Moore's rights. *See Connelly* v. *Comptroller of the Currency*, 876 F.2d 1209, 1212 (5th Cir. 1989). As a result, dismissal of Moore's claim of violation of due process and of the right to an informed, fair and impartial grand jury is required. *See Siegert* v. *Gilley*, ___ U.S. ___, ___, 111 S. Ct. 1789, 1793-94 (1991).

(ii) *First Amendment Claim and Malicious Prosecution Claim*

Moore claims that the postal inspectors prosecuted him in retaliation for exercise of his first amendment rights. In addition, he maintains that the postal inspec-

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[9] Defendants' Motion to Dismiss, pp. 9-19.

[10] For the conflict in decision among the circuits, *see United States* v. *Page*, 808 F.2d 723, 727 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987).

tors prosecuted him out of malice or "bad faith." A cause of action under the rubric of "retaliatory prosecution" is properly pled where (1) the plaintiff's conduct is constitutionally protected; and (2) the protected conduct was a motivating factor in the decision to prosecute. *See Wilson* v. *Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979); *Rackovich* v. *Wade*, 850 F.2d 1180, 1189-90 (7th Cir.) (en banc), *cert. denied*, 488 U.S. 968 (1988). To succeed on a claim of retaliatory prosecution, Moore must show that the prosecution was motivated in part by the defendants' desire to retaliate against him for exercising his constitutional rights. *See Gates* v. *City of Dallas*, 729 F.2d 343, 345 (5th Cir. 1984). A "bad faith" prosecution is one initiated without probable cause. *See Wheeler* v. *Cosden Oil and Chemical Company*, 734 F.2d 254, 260-61 (5th Cir.), *modified in part, reh'g denied*, 744 F.2d 1131 (1984). To successfully state malicious prosecution claim against a law enforcement official, it is only necessary to plead that the official deliberately provided false and misleading evidence to obtain an indictment. *See Wheeler*, 734 F.2d at 260.

On each of these claims, Moore has met his burden under the rule 12(b)(6) standard. He has asserted a set of facts supporting each claim that, if found to be true regarding the element of malice, would overcome defendants' qualified immunity defense and entitle him to relief. Discovery should therefore proceed on both of these claims.

B. *Personal Jurisdiction*

When nonresident defendants move to dismiss for lack of personal jurisdiction, the plaintiffs bear the burden of establishing the trial court's jurisdiction over

them. *DeMelo* v. *Toche Marine, Inc.*, 711 F.2d 1260, 1270 (5th Cir. 1983). If the district court chooses to decide the matter without an evidentiary hearing, the plaintiffs may meet their burden by presenting a prima facie case for personal jurisdiction. *Id.* at 1270-71. The court will take the allegations of the complaint as true, except where they are controverted by opposing affidavits, and all conflicts in the facts are resolved in favor of the plaintiff. *Thompson* v. *Chrysler Motors Corporation*, 755 F.2d 1162, 1165 (5th Cir. 1985). In making its determinations, the court may consider affidavits, interrogatories, depositions, oral testimony, or any combination of recognized discovery methods. *Id.*; *Stuart* v. *Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985).

A federal court may only exercise personal jurisdiction if it is authorized to do so by law and such exercise does not violate the Constitution. In a federal question case in federal court, the relevant constitutional provision is the due process clause of the fifth amendment. *Burstein* v. *State Bar of California*, 693 F.2d 511, 514 (5th Cir. 1982). The law authorizing such service is Rule 4(e), F.R. Civ. P. The second sentence of that rule, authorizing service on non-resident defendants "under the circumstances and in the manner prescribed in the statute," allows resort to a state long-arm statute "only to reach those parties whom a court of the state could also reach under it." *Id.* at 514. *Accord*, *DeMelo*, 711 F.2d at 1266-69; *Point Landing Inc.* v. *Omni Capital International Ltd.*, 795 F.2d 451, 424-27 (5th Cir. 1986) (en banc), *aff'd*, 484 U.S. 97 (1987).[11]

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[11] Most cases deciding the reach of state long-arm statutes have arisen in a diversity context. *Burstein*, *DeMelo*, and *Point Land-*

The Texas long-arm statute authorizes suit agaisnt a non-resident defendant "if the nonresident . . . commits a tort in whole or in part in [Texas]." TEX. CIV. PRACT. & REM. CODE. § 17.042(2) (Vernon 1986). Because this statute has been interpreted to extend to the constitutional limits of due process, *Helicopteros Nacionales de Columbia*, 638 S.W.2d 870, 872 (Tex. 1982), *rev'd on other grounds*, 466 U.S. 408 (1984), "a non-resident's amenability to personal jurisdiction under the Texas long-arm statute collapses into a federal-style inquiry as to whether jurisdiction comports with federal constitutional guarantees." *Bullion* v. *Gillespie*, 895 F.2d 213, 215-16 (5th Cir. 1990).

According to the plaintiffs, the individual defendants are subject to the jurisdiction of this court because they committed torts which had foreseeable effects in Texas. The Supreme Court, however, has expressly rejected such a test. *See Burger King Corporation* v. *Rudzewicz*, 471 U.S. 462, 474 (1985) ("[a]lthough it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction") (emphasis in original).

It has also been held, moreover, that where defendants' contact with the forum rests solely on "the mere fortuity that the plaintiff happens to be a resident of the forum," due process requirements are not satisfied. *Southmark Corporation* v. *Life Investors, Inc.*, 851

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ing, by contrast, are federal question cases where the statute presenting the federal question does not authorize nationwide service of process.

F.2d 763, 773 (5th Cir. 1988) (citing *Patterson* v. *Dietze, Inc.*, 764 F.2d 1145, 1147 (5th Cir. 1985)). All that the plaintiffs have shown regarding the individual defendants' contacts with Texas amounts to no more than such a fortuity.

Although the plaintiffs have discussed various contacts some of the individual defendants had with Texas or with Moore in Texas in their official capacities, such contacts cannot serve, in and of themselves, as a basis for obtaining personal jurisdiction over the defendants in their individual capacities. *Stephens* v. *Coleman*, 712 F. Supp. 1571, 1576 (N.D. Ga. 1989) *aff'd*, 901 F.2d 1571, 1578 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 555 (1990) ("[p]laintiff has not given sufficient information relative to [defendant] Dunst's activities or contacts as they pertain to plaintiff while on [her official] visits [to Georgia from Washington, D.C.]"). Furthermore, even were sufficient contacts with Texas established, the court would still have to consider the "reasonableness" of maintaining jurisdiction here, *i.e.*, whether the assertion of personal jurisdiction in this court would comport with traditional notions of fair play and substantial justice. *Id.*, 712 F. Supp. at 1576 and 1577 ("reasonableness" factors indicated that records and witnesses were likely located in Washington, D.C., and that "case could be more efficiently handled in that forum"). *See also Edmond* v. *United States Postal Service*, 727 F. Supp. 7, 9-10 (D.D.C. 1989) (Revercomb, J.), a case quite similar factually to this case, in which it was held that a nonresident assistant U.S. attorney was not subject to the jurisdiction of the court.

Plaintiffs have failed to demonstrate that the individual defendants are subject to the jurisdiction of this court. Although the defendant's motion to dismiss

on this ground is meritorious, the court has determined that transfer, rather than dismissal, is the appropriate relief. 28 U.S.C. § 1406(a).

IV. *CONCLUSION*

In summary, defendants' motion to dismiss all constitutional claims brought by Mrs. Moore against the defendants is GRANTED; their motion to dismiss Moore's constitutional claims against Valder is GRANTED; their motion to dismiss Moore's constitutional claims against Hartman, Korman, Edwards, McIntosh, Harrington, Robbins and other unnamed defendants is GRANTED as to the fifth amendment/due process and fair and impartial grand jury claims but is DENIED as to the malicious prosecution and first amendment claims; and their motion to dismiss for want of personal jurisdiction, though meritorious, will be denied in favor of transfer to the United States District Court for the District of Columbia, a district in which the defendants are, under the plaintiffs' allegations, subject to jurisdiction.

Accordingly, all claims not dismissed by this memorandum order are TRANSFERRED to the United States District Court for the District of Columbia.

SO ORDERED.

September 21, 1992.

/s/ A. JOE FISH
A. JOE FISH
United States District Judge

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5241

WILLIAM G. MOORE, JR., APPELLEE

v.

MICHAEL HARTMAN, ET AL., APPELLANTS

Filed: January 31, 2005

Before: GINSBURG, Chief Judge, and EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARLAND,* and ROBERTS, Circuit Judges, and WILLIAMS, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: Michael C. McGrail
Deputy Clerk

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* Circuit Judge Garland did not participate in this matter.

Supreme Court, U.S.
FILED
MAY 27 2005
OFFICE OF THE CLERK

No. 04-1495

IN THE

Supreme Court of the United States

MICHAEL HARTMAN *ET AL.*,

Petitioners,

v.

WILLIAM G. MOORE, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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May 27, 2005

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QUESTIONS PRESENTED

1. Whether the court below properly applied this Court's decisions in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), and *Crawford-El v. Britton*, 523 U.S. 574 (1998), when it held that where the plaintiff in a *Bivens* action has presented compelling evidence that the defendant officers procured his criminal indictment and prosecution in retaliation for his exercise of First Amendment rights, and the defendant officers have not shown that they would have pursued the charges absent retaliatory motive, the defendant officers are not entitled to qualified immunity.

2. Whether, if so, the court of appeals correctly interpreted the law of its own circuit in holding that the First Amendment right to be free from retaliatory prosecution was clearly established at the time of the defendants' conduct.

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INTRODUCTION

In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court made clear that the government violates the First Amendment if, in subjecting an individual to an otherwise proper adverse action, the government does so "by reason of [the individual's] exercise of [his] constitutionally protected First Amendment freedoms." *Id.* at 283-84. And in *Crawford-El v. Britton*, 523 U.S. 574 (1998), this Court held that government officials defending against a *Mt. Healthy*-style First Amendment retaliation claim are not entitled to qualified immunity simply because their conduct was "objectively valid, regardless of improper intent." *Id.* at 594 (internal quotation marks omitted). The D.C. Circuit's decision below that the claimed existence of probable cause, in and of itself, does not entitle Petitioners to qualified immunity from Respondent's claim that he was prosecuted in retaliation for his exercise of First Amendment rights represents nothing more than the straightforward application of these two precedents.

Petitioners contend that this Court should nevertheless review the decision below to resolve an alleged circuit split. But Petitioners overstate the disagreement among the lower courts. At least three circuits apply a rule entirely consistent with the decision below. And those decisions in purported conflict with the opinion below not only demonstrate superficial treatment of the legal issues and uncritical reliance on circuit precedent predating *Crawford-El*, but also involve underlying facts that differ substantially from the unique circumstances of this case. Indeed, the rule applied by the D.C. Circuit would likely yield the same result as that of the purportedly conflicting decisions in the vast majority of circumstances. For these reasons, the lower courts ought to be given the opportunity to more fully address the matter and reconcile their decisional law with the relatively recent ruling in *Crawford-El*.

In any event, given that other procedural mechanisms already exist to prevent most retaliatory prosecution claims from proceeding to trial, the D.C. Circuit's decision to allow this case to proceed to trial represents a truly "rare circumstance" that does not create an issue of substantially recurring importance. Moreover, even if the Court wished to address the matter, this case would not present an appropriate vehicle for doing so. The court of appeals' decision is interlocutory, and this Court would benefit from a full factual record. In particular, even on their own view of the law, Petitioners' claimed entitlement to qualified immunity is entirely hypothetical because the district court found that there are material facts in dispute concerning whether there was probable cause to prosecute Moore. Thus, not only are there alternative grounds on which denial of qualified immunity would be proper even if this Court were to disagree with the D.C. Circuit's decision, but the Petitioners' qualified-immunity claim will embroil this Court in precisely the sort of factual dispute that should not be appealed until a final judgment is issued. The petition should be denied.

STATEMENT OF THE CASE

Until the events at issue here, the career successes in the life of Respondent William G. Moore, Jr., showed that he had seemingly unlimited potential. In 1982, Moore was recruited to turn around Recognition Equipment Inc. ("REI"), a pioneer in optical-scanning technology that had fallen on hard times and was flirting with bankruptcy. C.A. App. 848-49.[1] Within a year, Moore returned the company to profitability and increased its stock price more than six-fold. *Id.* Moore was widely acclaimed for REI's turnaround,

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[1] Citations to "C.A. App. __" refer to pages of the Appendix jointly filed below.

with *Forbes Magazine* opining that "[f]ew [corporate] turnarounds owe so much to a single executive." C.A. App. 849-50. Moore's seemingly unlimited prospects, however, were destroyed by Petitioners (the "Postal Inspectors"[2]), who subjected Moore to years of investigation and an unfounded prosecution in retaliation for his criticism of, and lobbying against, the United States Postal Service ("USPS") and its senior management. Although Moore was easily acquitted upon motion at the end of the Government's six-week case, his company and his career were ruined.

1. The Scanner Controversy. The facts leading to Moore's downfall revolve around the Postal Service's decision to automate its mail-sorting processes by purchasing hundreds of millions of dollars of optical-character-reading devices. C.A. App. 1019-21, 1035-50. In late 1983, Postmaster General ("PMG") William Bolger announced that the Postal Service would purchase foreign-made single-line scanners, which were dependent upon use of nine-digit zip codes, rather than multi-line scanners of the sort made in the United States by REI, which could be used effectively with five-digit zip codes. Pet. App. 2a.

The decision to use single-line scanners became a flash point with the USPS Board of Governors and with Congress. Pet. App. 3a. In 1984, a study by Congress's Office of Technology Assessment ("OTA") concluded that the use of single-line scanners would cause over $1 million per day in operational losses. Pet. App. 3a. Ultimately, when it became apparent that postal customers were not using nine-digit zip codes at the necessary levels, the Postal Service was forced in 1985 to make a "mid-course correction" and

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[2] As used herein, the term "Postal Inspectors" refers to Petitioners and Daniel Harrington, a defendant who died during the pendency of this lawsuit.

employ multi-line scanners. Pet. App. 4a. As a result of the controversy, Bolger's successor, Paul Carlin, and other senior USPS managers who had supported single-line scanners were reassigned, fired or forced to retire. C.A. App. 779; *United States v. Recognition Equip. Inc.*, 725 F. Supp. 587, 598-99 (D.D.C. 1989).

2. Moore's Lobbying and Public Criticism of the USPS. Moore and REI were at the epicenter of the scanner controversy. Moore thought the decision to rely upon single-line scanners was unsound, and he unabashedly and aggressively took his case to PMG Bolger, the Board of Governors, Congress, and the public—as he was constitutionally entitled to do. Pet. App. 3a; C.A. App. 851-52. As a result of this lobbying, Moore persuaded Congressman Martin Frost to initiate the OTA study and, later, to introduce an amendment to an appropriations bill requiring the USPS to buy American multi-line technology. Pet. App. 3a; C.A. App. 852-53. Not surprisingly, USPS management saw Moore and REI as the enemy.

3. Petitioners' Investigation of Moore's Political Activities. Motivated by hostility towards Moore for his role in the scanner-procurement controversy, the Postal Inspectors launched a retaliatory investigation of Moore's activities. As early as December 1985, the Postal Inspectors prepared an "Investigative Strategies" memo that labeled Moore and REI as "coconspirators in a scheme to defraud the U.S. Postal Service," even though, as Petitioner Edwards later conceded, there was no evidence that any such conspiracy existed. C.A. App. 246.

Pursuant to this strategy, the Postal Inspectors scrutinized REI's and Moore's political contributions and communications with public officials with no apparent regard for the First Amendment protection afforded to these activities. Pet. App. 21a-22a. Thus, the Postal Inspectors issued subpoenas for records concerning Moore's and REI's

political contributions, "meetings with United States Congressmen," "articles placed with trade publications and reporters," and "interviews with journalists and reporters." Pet. App. 21a-22a. They also questioned REI officials about the company's lobbying efforts, political contributions, and fundraising; interrogated a congressional staffer about her Congressman's assistance to REI; and even tried to dig up "dirt" to throw on REI's congressional supporters, as shown in a USPS document produced in discovery. C.A. App. 194, 247-49.

4. The Voss/Gnau Kickback Scheme. In late February 1986—after they had prepared the "Investigative Strategies" memorandum and begun to investigate Moore's and REI's political and media activities—the Postal Inspectors discovered that Peter Voss, a member of the USPS Board of Governors, was receiving payments from John Gnau, the principal of Gnau & Associates, Inc. ("GAI"), the consulting firm that REI had hired—on Voss's recommendation—to assist with its lobbying efforts. Pet. App. 4a; C.A. App. 172, 212-13, 216-17. The Postal Inspectors quickly learned that Voss and his administrative assistant, along with Gnau and two other GAI officials, were involved in the conspiracy. Pet. App. 4a; C.A. App. 304. Three of the coconspirators plead guilty; the other two received immunity from prosecution in exchange for cooperation. Pet. App. 4a; C.A. App. 287-88.

The Known Conspirators Exonerate Moore — Though lacking any evident reason to protect Moore, none of the coconspirators ever implicated Moore in the kickback conspiracy. Pet. App. 25a. The Postal Inspectors repeatedly urged the conspirators to implicate Moore, on occasion using "extraordinary" and improper pressure tactics, but again and again the conspirators each informed the inspectors that Moore was not involved. *Id.* Voss even told the Postal Inspectors that there was "no way Moore knew" anything improper was occurring. Pet. App. 26a.

5. Petitioners' Retaliatory Efforts to Procure Moore's Indictment. Having failed to find any direct evidence to tie Moore to the kickback scheme, the Postal Inspectors resorted to highly unusual and deceptive tactics to obtain Moore's indictment.

Petitioners' Retaliatory Intent — The Postal Inspectors candidly acknowledged in writing that a primary reason for pursuing Moore and REI was Moore's attempt to reverse the decision to employ single-line scanners through lobbying against, and public criticism of, USPS management. In a memorandum entitled "Arguments for Indicting the Corporation"—which the court of appeals described as "evidence of retaliatory motive . . . close to the proverbial smoking gun" (Pet. App. 28a)—the inspectors' very *first* justification for indicting REI, completely "[i]ndependent of [the] Voss/GAI actions," was that "the corporation and its PAC funded a media and political campaign to discredit USPS management and cause financial harm to USPS, for example . . . staged questions and testimony before Congress [and] Frost amendment to freeze USPS appropriations bill." Pet. App. 20a.

Likewise, in a "Details of Offense" memorandum for the U.S. Attorney summarizing the evidence supporting an indictment, the inspectors wrote that REI's fraudulent intent is evident, among other things, in the fact that "at Moore's and Reedy's suggestion and with their substantial input relative to its drafting, Congressman Frost proposed an amendment to a USPS appropriat[ions] bill that in effect would freeze USPS revenue until [multi-line scanners] were purchased from REI." Pet. App. 21a; *see also id.* ("During the period August 1985 to April 1986, REI continued to

undermine the competitive testing program via the media and Congress.").[3]

Lobbying of the U.S. Attorney — The Postal Inspectors also met with the U.S. Attorney's office on numerous occasions to advocate the indictment of Moore, Reedy, and REI. C.A. App. 253-54, 1430, 1550, 1554. Paul Knight and Charles Leeper, the Chief and Deputy Chief of Prosecutions, were not impressed, concluding that, while Moore and REI "played 'hardball' with the Postal Service," the evidence that Moore and Reedy acted criminally or knew about the payments to Voss was "not particularly strong," and the case against Moore was especially weak. C.A. App. 1429, 1433; Pet. App. 26a. Nonetheless, the Postal Inspectors continued to push for Moore's indictment, *see* C.A. App. 253-54, 1477-80, and, as a result of this "unusual prodding," the U.S. Attorney's office ultimately relented and approved the prosecution. Pet. App. 27a.

Misconduct Before the Grand Jury — In presenting their case to the grand jury, the Postal Inspectors went to extreme and improper lengths to keep the grand jury from hearing witnesses say that Moore did not know about the kickback scheme. Certain coconspirators and other witnesses testified, not by way of ordinary questions and answers, but by reading statements carefully scripted for them by the Postal

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[3] The rest of the memorandum is peppered with references to Moore's and REI's lobbying activities. *See, e.g.*, C.A. App. 680 ("REI lobbied several Congressmen to pressure USPS into purchasing equipment from REI"); *id.* ("REI drafted letters which Congressmen sent to USPS"); *id.* ("Reedy and Moore worked with Congressman Frost to draft an amendment to a USPS appropriations bill"); C.A. App. 755 (noting entries from Moore's diary concerning congressional hearings); C.A. App. 763 (noting Moore diary entry considering whether to apply "additional public pressure" through "[c]ongressional inquiry," "[l]etter writing," and "[n]ational press").

Inspectors in order to prevent the witnesses from telling the grand jury that they never told Moore or anyone else at REI about the payments to Voss, C.A. App. 197-98, 226—in violation of Department of Justice guidelines requiring presentation of exculpatory evidence to the grand jury, *see* Department of Justice, *United States Attorneys' Manual* § 9-11.233 (Oct. 1, 1988). Contrary to Postal Service policy, C.A. App. 197, the Postal Inspectors also refused to honor the request of one witness to correct the statement they drafted for him, and refused to allow that witness to answer questions from the grand jury. Pet. App. 27a. The Postal Inspectors also improperly showed another witness the scripted grand-jury statements of his coconspirators in order to elicit an "opinion" contrary to his personal knowledge that Moore knew that Voss was receiving money from Gnau; the Postal Inspectors then presented this "opinion" to the grand jury as evidence. Pet. App. 25a-26a; C.A. App. 1000-01.

6. Moore's Acquittal. Following Moore's indictment, the house of cards constructed by the Postal Inspectors collapsed. After the Government presented its case for six weeks, Moore, Reedy and REI filed motions for acquittal, which Judge Revercomb granted due to lack of evidence:

> The government's evidence is insufficient, even when viewed in the light most favorable to it, for a trier of fact to find guilt beyond a reasonable doubt. Much of what the government characterizes as incriminatory evidence is not persuasive of guilt when viewed in its full context. In fact, some of the government's evidence is exculpatory and points towards innocent conduct of the Defendants.

Recognition Equip., 725 F. Supp. at 587-88. There was, Judge Revercomb noted, a "complete lack of direct evidence to suggest that the Defendants knew of the illegal payoff scheme" between Voss and Gnau; indeed, "[a]ll of the unindicted coconspirators who testified expressly stated that they never told Moore or Reedy about the payments from Gnau to Voss." *Id.* at 596.

Consequently, even when viewed in the light most favorable to the Government, the Government's evidence did not "support a reasonable inference that the Defendants knew" of the conspiracy they allegedly joined. *Id.* at 589.

7. Moore's Lawsuit. Despite being acquitted, Moore was financially devastated by the indictment and prosecution wrongly procured by the Postal Inspectors. The mere fact of the indictment caused REI to be debarred from the scanner procurement, and Moore was suspended pursuant to a "cleansing plan" formulated by the Postal Inspectors and imposed on REI. C.A. App. 255. The publicly traded company that Moore had rescued from the brink of bankruptcy declined, was acquired by a smaller competitor, and eventually went out of business. C.A. App. 858. Moore also suffered the career equivalent of the death penalty. Prior to his indictment, as a well-respected executive in the high-tech industry, Moore had a reasonable prospect of becoming the CEO of one of the nation's biggest technology companies. C.A. App. 856. After the indictment, he was not even considered for such positions because no Board of Directors would hire someone who had been indicted. *Id.*

Moore sought compensation for his injuries by suing the Postal Inspectors, the prosecutor and the United States. Moore's claims and the thirteen-year history of this case are described in the Petition. Pet. at 7-12. Fact discovery has largely concluded, and, following the district court's denial of the defendants' motions for summary judgment (Pet. App. 42a), which the United States has not appealed, Moore's malicious-prosecution claim against the United States under the Federal Tort Claims Act ("FTCA") is awaiting trial.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW WAS DICTATED BY THIS COURT'S HOLDINGS IN *MT. HEALTHY* AND *CRAWFORD-EL*

Moore has presented compelling evidence that Petitioners procured his prosecution in retaliation for his exercise of First Amendment rights. *See supra* pp. 4-8. Petitioners do not challenge this evidence on appeal. Nor do Petitioners argue that Moore would have been prosecuted even absent their retaliatory motive. Instead, Petitioners argue that they are nevertheless entitled to qualified immunity—regardless of whether their improper intent caused Moore's prosecution—if they can establish that there was probable cause for that prosecution.[4]

Despite Petitioners' characterization of this question as one that has sharply divided the courts of appeals, the D.C. Circuit's rejection of their qualified-immunity defense represents a straightforward application of this Court's settled precedents on First Amendment retaliation and qualified immunity.

1. Since at least 1977, when this Court decided *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), it has been clearly established that an act taken in retaliation for the exercise of a First Amendment right violates the Constitution and is actionable even if the act, when taken for a different purpose, would have been proper. In *Mt. Healthy*, this Court considered whether the First Amendment permitted a high-school teacher to be

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[4] Even on their own view of the law, Petitioners' claimed entitlement to qualified immunity is entirely hypothetical because the district court found that there are material facts in dispute concerning whether there was probable cause to prosecute Moore. *See infra* Part IV.

discharged for publicly disclosing a grievance. Although the teacher was untenured and therefore terminable for any reason or no reason whatsoever, the Court held that he could "nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Id.* at 283-84. Since then, this Court has expressly observed that this general rule applies to retaliatory prosecutions. *See Wayte v. United States*, 470 U.S. 598, 608 (1985) ("[T]he decision to prosecute may not be deliberately based upon an unjustifiable standard . . . including the exercise of protected . . . constitutional rights" (citations and quotation marks omitted)).

2. For several years, the lower courts struggled to apply *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), which held that the defense of qualified immunity turns on the objective legal reasonableness of the conduct at issue, to claims, like the one in *Mt. Healthy*, based on allegations that an otherwise legitimate act had been taken with an unconstitutional motive. This Court resolved that debate in *Crawford-El v. Britton*, 523 U.S. 574 (1998), a case involving a prisoner's claim that a prison official had misdirected the prisoner's personal belongings in retaliation for the prisoner's exercise of his First Amendment rights.[5] The Court rejected any heightened pleading or proof standard for *Mt. Healthy*-style claims and, disagreeing with a position advocated by the dissent, held further that a government official defending against such a claim is not entitled to qualified immunity simply because the official's

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[5] Although *Crawford-El* involved a claim under 42 U.S.C. § 1983, this Court has held (as Petitioners implicitly concede, *see* Pet. at 13) that the standards for qualified immunity in a *Bivens* action are the same as the standards for qualified immunity in an action under § 1983. *See Butz v. Economou*, 438 U.S. 478, 500-01 (1978).

conduct was "objectively valid, regardless of improper intent." *Id.* at 594 (internal quotation marks omitted); *see also id.* at 593 (citing *Mt. Healthy*); *cf. id.* at 602 (Rehnquist, C.J., dissenting) (reasoning that a defendant should not be entitled to qualified immunity if the plaintiff can show through objective evidence that the alleged lawful reason for defendant's action "is actually a pretext").

3. Petitioners' argument—that a showing of probable cause, no matter how weak, and no matter how strong the evidence of retaliatory motive, necessarily entitles them to qualified immunity—contravenes both *Mt. Healthy* and *Crawford-El*. As *Mt. Healthy* makes clear, the absence of any possible legitimate reason for the challenged official act is *not* an element of a cause of action for retaliation against the exercise of First Amendment rights.[6] Moreover, just as the objective reasonableness of the defendant's acts in *Crawford-El* did not entitle her to qualified immunity from the prisoner's claim that the acts were taken with a motive to retaliate against him for the exercise of his First Amendment rights, so, too, here the alleged objective reasonableness of the Petitioners' acts (measured by whether there was probable cause to prosecute Moore) does not entitle them to qualified immunity from Moore's claim that he was prosecuted in retaliation for the exercise of his First Amendment rights.

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[6] As the court of appeals recognized, *Mt. Healthy* does have a "test of causation" (429 U.S. at 286) that would enable Petitioners to defeat Moore's claims by showing that the same decision to prosecute would in fact have been made even if the impermissible purpose had not been considered. Pet. App. 19a-20a; *Mt. Healthy*, 429 U.S. at 287. Of course, arguing, as Petitioners do here, "that the same decision would have been *justified* . . . is not the same as proving," as *Mt. Healthy* requires, "that the same decision would have been *made*." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995) (emphasis added, internal quotation marks omitted).

The D.C. Circuit's analysis comports with these principles. Judge Tatel, in a unanimous opinion joined by Judges Sentelle and Williams, followed *Mt. Healthy* and *Crawford-El*, as well as settled D.C. Circuit authority, in holding that "clearly established law . . . barred government officials from bringing charges they would not have pursued absent retaliatory motive, regardless of whether they had probable cause to do so." Pet. App. 2a. This holding, the court further explained, is "limited." Pet. App. 19a. "Given that probable cause ordinarily suffices to initiate a prosecution, that showing will be enough in most cases to establish that prosecution would have occurred absent bad intent." Pet. App. 19a. But "recovery remains possible . . . where," as here, "strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus." Pet. App. 20a; *cf. Mt. Healthy*, 429 U.S. at 285 ("[a] borderline or marginal [choice] should not [be] resolved against [an individual] because of constitutionally protected conduct"). This decision, in an unusual case with "proverbial smoking gun" evidence of retaliatory motive (Pet. App. 28a) was a proper—and completely unremarkable—application of this Court's settled precedents, and does not merit the Court's review.[7]

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[7] Petitioners make much of a proposed analogy between selective-prosecution claims under the Equal Protection Clause and retaliatory-prosecution cases under the First Amendment. Because the standard for selective-prosecution claims involves both a subjective component of "discriminatory motive" and an objective component of "discriminatory effect," *see Wayte*, 470 U.S. at 608, Petitioners posit that retaliatory-prosecution claims should require an objective showing of probable cause. Even if this question were not already resolved by the precedents discussed above, Petitioners' analogy would not withstand scrutiny.

First, the D.C. Circuit's decision already requires an objective showing, namely, that defendants' improper intent had the effect of

II. PETITIONERS OVERSTATE THE DIVISION OF AUTHORITY AMONG LOWER COURTS, WHICH SHOULD, IN ANY EVENT, BE GIVEN FURTHER OPPORTUNITY TO PERCOLATE IN LIGHT OF *CRAWFORD-EL*

Contending that this Court should nevertheless review the decision below to resolve a circuit split, Petitioners cite several cases that, in their view, establish that a showing of probable cause should entitle them to qualified immunity from claims that they retaliated against Moore for his exercise of First Amendment rights. But Petitioners significantly overstate the division of authority. At least three circuits apply a rule entirely consistent with the decision below. And those decisions in purported conflict with the opinion below not only demonstrate superficial treatment of the legal issues and uncritical reliance on circuit precedent predating *Crawford-El*, but also involve underlying facts that differ substantially from the unique circumstances of this case. Indeed, the rule applied by the D.C. Circuit would likely yield the same result as that of the purportedly conflicting decisions in the vast majority of circumstances. Thus, the split alleged by Petitioners is overstated, and even if the Court were inclined to resolve it, further percolation would be warranted.

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bringing about a prosecution that otherwise would not have occurred. Second, the D.C. Circuit's decision also already incorporates an objective showing of probable cause, deeming it "enough in most cases to establish that prosecution would have occurred absent bad intent." Pet. App. 19a. Third, the D.C. Circuit's decision actually brings more parity to selective-prosecution and retaliatory-prosecution claims; now, under both theories, probable cause operates only as a "defense to the charges" once a *prima facie* case is shown. Pet. App. 18a. Fourth and finally, any difference in the elements of the claims is justified by the different constitutional sources of the right at issue.

1. The decision of the D.C. Circuit below is entirely consistent with decisions from the Sixth and Tenth Circuits. For example, "[a]pplying the logic of *Mt. Healthy*," the Sixth Circuit has held that prosecutions or arrests "undertaken at least in part as retaliation for . . . constitutionally protected [speech are] impermissible unless it could be shown that the officer would have made the arrest even in the absence of any retaliatory motive." *Greene v. Barber*, 310 F.3d 889, 897 (6th Cir. 2002). Similarly, the Tenth Circuit has held that the fact that the conduct warranted the charges is not a defense to a First Amendment claim of retaliatory prosecution. *Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001).

Contrary to Petitioners' assertion, moreover, the Third Circuit's holding in *Merkle v. Upper Dublin School District*, 211 F.3d 782 (3d Cir. 2000), is also in accord with these decisions. In *Merkle*, the court held that a plaintiff alleging retaliatory action on account of her exercise of First Amendment rights must show only that the protected "speech was a motivating factor in the alleged retaliatory action." *Id.* at 793. Recognizing that a defendant could defeat such a claim by showing that "it would have taken the same adverse action . . . even in the absence of [the] protected speech," *id.*, the court found that weak evidence of probable cause gave rise to the inference that the motive was retaliatory and *denied* the defendant the protection of qualified immunity. *Id.* at 797-98. Even the third member of the panel, who would have upheld the qualified-immunity defense on the facts of the case, agreed that "it would be possible to sustain a First Amendment retaliation case predicated on the institution of criminal proceedings even though the defendant had probable cause to initiate the proceedings." *Id.* at 800 n.2 (Greenberg, J., concurring and dissenting).

Moreover, although Petitioners rely on decisions of the Second Circuit to establish a split, that court has made inconsistent pronouncements on the relevance of probable

cause to the qualified-immunity inquiry. Thus, while *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001), held that the presence of probable cause exonerates an official irrespective of motive, *Kerman v. City of New York*, 261 F.3d 229, 242 (2d Cir. 2001), a decision predating *Curley* by several weeks, held that, irrespective of probable cause, "direct evidence" of retaliatory intent suffices to allege a constitutional violation and defeat a claim for qualified immunity. In the only relevant district court case in the Second Circuit decided since then, the court followed the reasoning of *Kerman*, not *Curley*. *See Webster v. City of New York*, 333 F. Supp. 2d 184, 202-03 (S.D.N.Y. 2004); *cf. Blue v. Koren*, 72 F.3d 1075, 1083 n.5 (2d Cir. 1995) (describing contrary precedent, including *Mozzochi v. Borden*, 959 F.2d 1174 (2d Cir. 1992), as "troubling").

2. The split of authority alleged by Petitioners, *see* Pet. at 14, is also overstated because the rule applied by the D.C. Circuit would yield the same result as that of the purportedly conflicting decisions in the vast majority of circumstances.

The D.C. Circuit characterized its holding as "limited." The court explained:

> Given that probable cause ordinarily suffices to initiate a prosecution, that showing will be enough in most cases to establish that prosecution would have occurred absent bad intent. . . . [R]ecovery remains possible [only] in those rare cases where strong motive evidence combines with weak probable cause . . . .

Pet. App. 19a-20a. This is one of those "rare" cases: Moore has presented "evidence of retaliatory motive [that] comes close to the proverbial smoking gun," demonstrated that "evidence of [his] guilt seems quite weak" and shown the presence of "considerations that, under normal circumstances, might weigh against prosecuting a marginal case." Pet. App. 28a.

The bulk of the purportedly conflicting cases cited by Petitioners, by contrast, fall beyond these "limited"

circumstances, and into the "ordinar[y]" realm of cases where probable cause so clearly justifies a prosecution or an arrest as to either defeat any inference of retaliatory motive or leave no doubt that the arrest or prosecution would have occurred even absent the improper motive.

The Second and Eighth Circuit cases cited by Petitioners are illustrative, because—unlike this case—they involved little or no indicia of improper motive and strong evidence of probable cause. *See Curley*, 268 F.3d at 73 (finding probable cause to arrest plaintiff and "no evidence" of motive "beyond the allegation in [the plaintiff's] amended complaint"); *Smithson v. Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000) (finding probable cause to arrest the plaintiff while "seriously doubt[ing]his claim of pretext"); *cf. Blue*, 72 F.3d at 1083 n.5 (distinguishing circuit precedent, including *Mozzochi v. Borden*, 959 F.2d 1174 (2d Cir. 1992), by noting that cases "stressed the lack of particularized evidence of a retaliatory motive"). The cases cited by Petitioners from the Fifth and Eleventh Circuits similarly involved strong findings of probable cause that supported the grant of summary judgment in favor of defendants. *See Izen v. Catalina*, 398 F.3d 363, 368-69 (5th Cir. 2005) (per curiam); *Dahl v. Holley*, 312 F.3d 1228, 1235-36 (11th Cir. 2002); *Wood v. Kesler*, 323 F.3d 872, 879, 883 (11th Cir.), *cert. denied*, 540 U.S. 879 (2003); *Draper v. Reynolds*, 369 F.3d 1270, 1277 n.11 (11th Cir.), *cert. denied*, 125 S. Ct. 507 (2004).

Were the D.C. Circuit's methodology and holding to be applied to the facts of these "ordinar[y]" cases, their outcomes would presumably remain the same. The strong showing of "probable cause" in each case would have "suffice[d] to . . . establish that prosecution would have occurred absent bad intent." Pet. App. 19a. A split of authority that is limited to exceedingly "rare"—and, in most circuits, as yet hypothetical—factual settings is unworthy of this Court's attention.

3. In any event, the cases cited by Petitioners as creating a purported conflict with the opinion below generally reflect only cursory reasoning and either predate *Crawford-El* or fail to cite *Crawford-El* while placing dispositive, uncritical reliance on cases decided before it. *See, e.g.*, *Smithson*, 235 F.3d at 1063 (summarily relying on circuit precedent predating *Crawford-El*); *Keenan v. Tejeda*, 290 F.3d 252, 261-62 (5th Cir. 2002) (same); *Curley*, 268 F.3d at 73 (same). Even if the Court were inclined to view the cases as conflicting, therefore, further percolation would be warranted.

The Second Circuit's caselaw demonstrates the value of further percolation in these circumstances. In *Curley*, the court held that probable cause to arrest plaintiff warranted summary judgment for the defendant without inquiry into the underlying motive for the arrest. *Curley*, 268 F.3d at 73. Contemporaneous with that decision and since that time, however, the Second Circuit and district courts therein have relied upon *Crawford-El* to define retaliatory prosecution and qualified immunity without reference to probable cause and in accord with the decision of the D.C. Circuit below. *See Kerman*, 261 F.3d at 241-42; *Webster*, 333 F. Supp. 2d at 201. These latter decisions were not cited by Petitioners, and illustrate the gradual shift of authority as courts reconcile legal issues to varied factual settings and this Court's jurisprudence.

"[W]hen frontier legal problems are presented, periods of 'percolation' in . . . federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (citing *McCray v. New York*, 461 U.S. 961, 961-63 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari)). A fact-specific and hypothetical split of authority—based at least partly on cases relying on dated circuit precedent—does not warrant this Court's review.

III. THE QUESTIONS PRESENTED ARE NOT OF RECURRING IMPORTANCE

There is no merit to Petitioners' contention that review is warranted because the decision below will purportedly lead courts and civil juries "routinely" to second-guess the basis for criminal prosecutions and "may well increase" the number of retaliatory-prosecution actions that are brought. Pet. at 19. On the contrary, as the court below recognized, its ruling that the existence of probable cause does not defeat a claim of retaliatory prosecution is "limited" and will permit recovery only in "rare cases." Pet. App. 19a-20a.

First, the doctrine of absolute prosecutorial immunity ensures that prosecutors will almost always be entitled to immunity from suits for retaliatory prosecution in violation of the First Amendment. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 424 (1976). Indeed, the Assistant United States Attorney who prosecuted Moore successfully asserted a defense of absolute immunity in an earlier stage of this case. Pet. App. 81a-82a. For this reason, claims for retaliatory prosecution will generally be viable only where, as here, government officials who are not prosecutors had a substantial role in procuring the indictment or prosecution.

Second, Petitioners repeatedly mischaracterize the opinion below by arguing that, under the D.C. Circuit's approach, "probable cause is irrelevant" and "the existence of probable cause is not an obstacle to suit." Pet. at 19. On the contrary, the D.C. Circuit explained that because "probable cause ordinarily suffices to initiate a prosecution, that showing will be enough in most cases to establish that prosecution would have occurred absent bad intent" and therefore to immunize defendants from liability. Pet. App. 19a. Thus, as this Court recognized in *Crawford-El*, "existing law already prevents [allegations of] unconstitutional motive from automatically carrying a plaintiff to trial." 523 U.S. at 592. In particular, a defendant can still prevail prior to trial by showing that there

is no doubt that the same decision to prosecute would have been reached in the absence of the improper motive. *See id.* (explaining that the rules of causation set forth in *Mt. Healthy* may "facilitate summary judgment"); *see also supra* note 6.

Here, Petitioners' qualified-immunity defense was denied only because, as the court below recognized, the record contains evidence of retaliatory motive that "comes close to the proverbial smoking gun" (Pet. App. 28a; *see also supra* p. 6) and "quite weak indicators of probable cause" (Pet. App. 20a), thereby supporting the conclusion that "the prosecution would not have happened without retaliatory motive" (Pet. App. 22a). This situation, as the Court of Appeals recognized, is quite the "rare case[]." Pet. App. 20a.

Indeed, even though the D.C. Circuit's rule is not new, Pet. App. 29a, incidents of retaliatory-prosecution claims going to trial are exceedingly rare. In fact, a Westlaw search of jury verdicts reveals no verdicts on retaliatory-prosecution claims in the D.C. Circuit. There is simply no support for Petitioners' unfounded fear that the D.C. Circuit's rule will lead to increased litigation second-guessing legitimate prosecutorial decisions.

IV. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

Even were the Court inclined to address the question whether there should be an exception from the rules of *Mt. Healthy* and *Crawford-El* in the context of retaliatory prosecutions, this case does not provide an appropriate context to do so.

Even on their own view of the law, Petitioners' claimed entitlement to qualified immunity is entirely hypothetical. That is so because, as the district court determined in denying the United States' motion for summary judgment on Moore's malicious-prosecution claim against the United

States, there are material facts in dispute concerning whether there was probable cause to prosecute Moore. Pet. App. 42a. In particular, much of this dispute revolves around the improper tactics used by Petitioners in procuring and presenting evidence to the grand jury, *see supra* pp. 7-8, and whether the use of such tactics demonstrates that the Postal Inspectors knew that they lacked probable cause. *See, e.g.*, Pet. App. 27a (noting that "the inspectors behaved before the grand jury as if their case needed bolstering"). As a result of these unresolved factual disputes, Petitioners will not be entitled to qualified immunity even if they could prevail before this Court. To the contrary, Petitioners interlocutory appeal threatens to involve the appellate courts in precisely the sort of factual inquiry that should await final judgment.

In the qualified immunity context, an interlocutory order denying summary judgment is appealable only if it raises a "purely legal" issue that "can be decided with reference only to undisputed facts." *Mitchell v. Forsyth*, 472 U.S. 511, 529 n.10, 530 (1985). Questions of "evidentiary sufficiency," on the other hand, may not be decided on an interlocutory appeal from the denial of qualified immunity. *Johnson v. Jones*, 515 U.S. 304, 317-18 (1995). In arguing to the court of appeals below and now to this Court that the existence of probable cause warrants qualified immunity, Petitioners are directly challenging the district court's determination that Moore's evidence is sufficient to permit a jury to conclude that probable cause did not exist.

Indeed, the D.C. Circuit's conclusion that Petitioners are not entitled to qualified immunity centered around that court's view that the evidence of probable cause in this case is "quite weak." Pet. App. 22a. In particular, there was no evidence that Moore either knew of the kickback conspiracy or agreed to join it. Pet. App. 25a. Indeed, though lacking any apparent reason to protect Moore, and despite "extraordinary pressure" placed on them by Petitioners, the coconspirators uniformly denied that they ever told Moore

about the payments. Pet. App. 25a. Moreover, the evidence on which Petitioners rely to show probable cause either relates to Reedy, Moore's colleague at REI, rather than to Moore himself, Pet. App. 23a or "reflect[s] perfectly innocent business considerations," Pet. App. 24a. *See also Recognition Equip.*, 725 F. Supp. at 587-88 ("Much of what the government characterizes as incriminatory evidence is not persuasive of guilt when viewed in its full context."). Other evidence, such as Petitioners' misconduct during the grand-jury proceedings, *see supra* pp. 7-8, shows that, by "behav[ing] before the grand jury as if their case needed bolstering," Pet. App. 27a, Petitioners knew that they did not have probable cause to prosecute Moore.[8]

Under these circumstances, Petitioners do not present a pure legal question for resolution. Instead, their claimed entitlement to qualified immunity is inextricably intertwined with an assessment of whether the voluminous record evidence, when viewed in the light most favorable to Moore, is sufficient to permit a jury to conclude that probable cause was absent. This is precisely the sort of assessment that should not be made by an appellate court until a final judgment has issued.

---

[8] Indeed, given the procedural posture of this case, granting qualified immunity to Petitioners at this time will do little to further one of the principal goals of that defense, namely "to protect public servants from the burdens of trial and discovery," *Crawford-El*, 523 U.S. at 576; *see also Harlow*, 457 U.S. at 816 (noting that pretrial discovery "can be peculiarly disruptive of effective government"). This is so because fact discovery in this case has largely concluded, and a trial centering around Petitioners' conduct is all but inevitable, given the district court's denial of summary judgment on Moore's FTCA claim against the United States for malicious prosecution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 27, 2005

Supreme Court, U.S.
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(6)

No. 04-1495

In the Supreme Court of the United States

MICHAEL HARTMAN, ET AL., PETITIONERS

v.

WILLIAM G. MOORE, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

No. 04-1495

MICHAEL HARTMAN, ET AL., PETITIONERS

v.

WILLIAM G. MOORE, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondent contends (Br. in Opp. 10-22) that the court of appeals' decision was dictated by this Court's precedents; that the circuit conflict identified in the petition does not need to be resolved; that the questions presented do not have recurring importance; and that this case is an unsuitable vehicle for deciding them. Each of these contentions is mistaken.[1]

A. The Court Of Appeals' Decision Was Not Dictated By This Court's Precedents

Contrary to respondent's contention (Br. in Opp. 10-13), this case does not involve "a straightforward application" (*id.* at 10)

[1] Respondent does not take issue with petitioners' submission (Pet. 22-25) that, if the Court grants certiorari on question one (whether the existence of probable cause defeats a claim of retaliatory prosecution), it should also grant certiorari on question two (whether, if the existence of probable cause does not defeat a claim of retaliatory prosecution, the law to that effect was clearly established when respondent was charged).

of *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and *Crawford-El* v. *Britton*, 523 U.S. 574 (1998). Claims of retaliatory *prosecution* are distinct from other First Amendment-based retaliation claims and, again contrary to respondent's contention (Br. in Opp. 13-14 n.7), are governed by principles analogous to those that govern claims of selective prosecution.

1. *Mount Healthy* does not hold that *any* act "taken in retaliation for the exercise of a First Amendment right violates the Constitution and is actionable even if the act, when taken for a different purpose, would have been proper." Br. in Opp. 10. Like the other decisions in the line of cases beginning with *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), *Mount Healthy* involved a First Amendment challenge to a personnel decision by a public employer. The principle established in those cases thus does not apply to every "act" by the government, much less to a decision to prosecute. Unlike the decision whether to dismiss, demote, or transfer an employee, the decision whether to prosecute is one that courts are "properly hesitant to examine." *Wayte* v. *United States*, 470 U.S. 598, 608 (1985). Prosecutorial decisionmaking is a "core executive constitutional function," *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996), and inquiries into whether a prosecutor or grand jury would have acted absent consideration of a particular factor are fraught with difficulty. Accordingly, the standard for a claim of retaliatory prosecution, unlike that for a claim of a retaliatory personnel decision, must be "particularly demanding." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999).

As for *Crawford-El*, that case rejected "special procedural rules" for "constitutional claim[s] that require[] proof of improper motive." 523 U.S. at 577. This case does not implicate an across-the-board procedural rule for claims of that type—or, indeed, *any* procedural rule. Rather, petitioners contend that, in the unique context of prosecutorial decisionmaking, a substantive

claim of retaliatory prosecution in violation of the First Amendment will not lie if the charges are supported by probable cause. This Court's decisions hold that, in the same prosecutorial context, it is not a violation of equal protection to act on the basis of a discriminatory motive if charges are also filed against those who are similarly situated. See Pet. 16-18. *Crawford-El* obviously does not alter that principle, and it has no greater bearing on the questions presented here.

Respondent likewise ignores *Heck* v. *Humphrey*, 512 U.S. 477 (1994), in which this Court made clear that the absence of probable cause is a substantive element of the common-law tort of malicious prosecution. *Id.* at 485 n.4. Nothing in *Crawford-El* alters the substantive elements of a malicious-prosecution claim, and respondent's assertion that petitioners retaliated against him for the exercise of his First Amendment rights is merely one species of such a claim. See Pet. 18-19. Thus, the rule that petitioners advocate in this case, unlike the heightened pleading rule rejected in *Crawford-El*, has a firm "common-law pedigree." 523 U.S. at 595.

2. Respondent does not offer any persuasive ground for distinguishing retaliatory prosecution from selective prosecution, such that an objective showing is required in the latter but not the former context. Respondent contends that "any difference in the elements of the claims is justified by the different constitutional sources of the right at issue." Br. in Opp. 14 n.7. But a regime in which it is easier to establish a claim of retaliatory prosecution than a claim of selective prosecution would make sense only if free speech were somehow more important than the equal protection of the laws, and no one (including respondent) takes that position. See Pet. 17-18.

In the alternative, respondent contends that the court of appeals' standard for retaliatory-prosecution claims *does* "require[] an objective showing"—namely, that "defendants' improper intent had the effect of bringing about a prosecution that otherwise

would not have occurred." Br. in Opp. 13-14 n.7. Indeed, respondent goes so far as to argue that the court of appeals' standard "incorporates an objective showing of *probable cause*," *id.* at 14 n.7 (emphasis added), since probable cause (according to respondent) will be "enough in most cases to establish that prosecution would have occurred absent bad intent," *ibid.* (quoting Pet. App. 19a). But in light of prosecutorial discretion, a showing that charges would have been brought even in the absence of a retaliatory motive is a *subjective* showing, requiring—as respondent himself asserts (*id.* at 12 n.6)—a demonstration that the prosecution *would* have occurred, not that it *could* have. And as the court of appeals recognized (Pet. App. 13a), the existence of probable cause is only one of many factors that bear on the ultimate *subjective* question whether charges would have been brought if there had been no retaliatory motive. See Pet. 21-22. Moreover, that subjective inquiry is one that necessarily intrudes into the deliberations concerning prosecutorial discretion, while a truly objective inquiry allows courts to avoid such intrusion.

B. The Circuit Conflict Should Be Resolved By This Court

As the petition explains (at 13-15), there is a five-to-three circuit conflict, acknowledged within the last seven months by courts on both sides of the issue, on the question whether the existence of probable cause defeats a claim of retaliatory prosecution. Respondent contends (Br. in Opp. 14-18) that petitioners have overstated the division of authority and that, in any event, further percolation is warranted. Respondent is mistaken.

1. Contrary to respondent's contention (Br. in Opp. 15), the Third Circuit did decide in *Merkle* v. *Upper Dublin School District*, 211 F.3d 782 (2000), that the existence of probable cause defeats a claim of retaliatory prosecution. The plaintiff in that case claimed that the defendants had "instituted a criminal prosecution against her" in retaliation for her speech, *id.* at 793, and the court of appeals reversed summary judgment for the defen-

dants because a jury could find that the prosecution was "motivated by a desire to retaliate" against the plaintiff, *id.* at 796. In so holding, the court found "groundless" the concern that its decision would make employers "reluctant to bring criminal proceedings against an employee even when the employee is found violating the criminal law," because, the court explained, an employer incurs no risk of a suit for retaliatory prosecution when (unlike in that case) "the employer has probable cause to believe that its employee had committed a criminal violation." *Ibid.* As the court below recognized (Pet. App. 15a), the decision in *Merkle* is therefore not "in accord" (Br. in Opp. 15) with the decision in this case.

Respondent is also mistaken in his contention (Br. in Opp. 15-16) that the Second Circuit held in *Kerman* v. *City of New York*, 261 F.3d 229 (2001), that a plaintiff can establish retaliatory prosecution "irrespective of probable cause" (Br. in Opp. 16). That case did not address the question. See 261 F.3d at 241-242. Nor did the district court decision that purportedly "followed the reasoning" (Br. in Opp. 16) of *Kerman*. See *Webster* v. *City of New York*, 333 F. Supp. 2d 184, 201-203 (S.D.N.Y. 2004). As the petition explains (at 14 n.4), the only Second Circuit decisions that did address the question—including *Curley* v. *Village of Suffern*, 268 F.3d 65 (2001), which was decided after *Kerman*—held that the existence of probable cause does defeat a claim of retaliatory prosecution.

2. Despite his effort to minimize the contrary authority in the Second and Third Circuits, respondent in the end does not dispute that there is a circuit conflict on the question whether probable cause defeats a claim of retaliatory prosecution. Instead, he contends (Br. in Opp. 16-17) that review is unwarranted because the conflicting standards will "yield the same result" except in those cases in which "strong motive evidence combines with weak probable cause," *id.* at 16 (quoting Pet. App. 20a). The cases from the circuits that have adopted petitioners' position,

according to respondent, "involved little or no indicia of improper motive and strong evidence of probable cause," and thus, he argues, "[w]ere the D.C. Circuit's methodology and holding to be applied to the facts of these * * * cases, their outcomes would presumably remain the same." *Id.* at 17.

Respondent's theory is flawed in at least three respects. First, it is not evident why, under the court of appeals' approach, "strong evidence of probable cause" (Br. in Opp. 17) will ordinarily enable a defendant to prevail. Probable cause "represents only one factor among many in the decision to prosecute" (Pet. App. 13a), and thus juries in the minority circuits are free to conclude that, despite abundant evidence of probable cause, charges would not have been filed but for the defendant's retaliatory motive. See Pet. 21-22. Second, even if respondent were correct that a defendant would ordinarily be able to prevail under either standard when probable cause was clearly present, the liability of the when probable cause was present *but not clearly so* would depend on the circuit in which the lawsuit is filed. Third, even if the *outcome* of litigation will be the same in *many* cases, the *conduct* of litigation will be quite different in *all* cases. See Pet. 20-21. In the Second, Third, Fifth, Eighth, and Eleventh Circuits, there will *never* be an inquiry into the motives for bringing a prosecution that is supported by probable cause, and since the existence of probable cause can often be determined as a matter of law at the summary-judgment stage, defendants will routinely be able to prevail before trial. In the District of Columbia, Sixth, and Tenth Circuits, in contrast, there will *always* be an inquiry into motive, and since an improper motive is "easy to allege and hard to disprove," *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 175 (2004) (quoting *Crawford-El*, 523 U.S. at 585), retaliatory-prosecution cases in those circuits will regularly proceed to trial.

3. In the alternative, respondent contends (Br. in Opp. 18) that the Court should allow further "percolation" so that the

lower courts can consider whether *Crawford-El* requires the conclusion that the existence of probable cause does not defeat a claim of retaliatory prosecution. As explained above, however, see pp. 2-3, *supra*, *Crawford-El* has no bearing on the questions presented in this case. And even if it did, there has already been ample time for "percolation," inasmuch as eight of the ten court of appeals cases that reject the position advocated by respondent were decided after *Crawford-El* was decided. See Pet. 14 & nn.4-8. Indeed, six of the ten cases postdated *Crawford-El* by more than three years. See *ibid.*

C. The Questions Presented Have Recurring Importance

In support of his contention that the issues in this case do not have recurring importance (Br. in Opp. 19-20), respondent points out that "the doctrine of absolute prosecutorial immunity ensures that prosecutors will almost always be entitled to immunity from suits for retaliatory prosecution" (*id.* at 19). Because cases are brought to the attention of prosecutors by the law-enforcement officers who observed or investigated the crime, however, there will almost always be a defendant available to sue for retaliatory prosecution. That is borne out by the large number of reported appellate decisions involving a claim of retaliatory prosecution, including decisions in eight circuits that address the question whether probable cause defeats such a claim.

Respondent also argues that the issues do not have recurring importance because, even under the court of appeals' standard, "a defendant can still prevail prior to trial by showing that * * * the same decision to prosecute would have been reached in the absence of the improper motive." Br. in Opp. 19-20. While that may be true, it is also true that, under the standard advocated by respondent, there will be a problematic examination of the motive for bringing the prosecution in every case, irrespective of whether the officer-defendant ultimately wins or loses, and irrespective of whether the case is resolved before or after trial. As

explained in the petition (at 19-20), the court of appeals' decision is therefore important because it threatens to "undermine prosecutorial effectiveness" (as well as the values underlying absolute prosecutorial immunity) by "revealing the Government's enforcement policy," diverting officers from their duties, and generally "chill[ing] law enforcement." *Wayte*, 470 U.S. at 607.[2]

D. This Case Is A Suitable Vehicle For Resolving The Questions Presented

Respondent contends (Br. in Opp. 20-22) that this case is not a suitable vehicle for deciding whether the existence of probable cause defeats a claim of retaliatory prosecution because the district court found that "there are material facts in dispute concerning whether there was probable cause to prosecute [respondent]" (*id.* at 21), and thus petitioners "will not be entitled to qualified immunity even if they could prevail before this Court" (*ibid.*). That is not correct.

As an initial matter, it is not clear that the district court determined that respondent's evidence "is sufficient to permit a jury to conclude that probable cause did not exist." Br. in Opp. 21. Rather than agreeing with petitioners that the existence of probable cause defeats a claim of retaliatory prosecution but concluding that the question whether there was probable cause

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[2] In the minority circuits, plaintiffs in retaliatory-prosecution cases can be expected to make discovery requests like the interrogatory served by respondent a few days after the certiorari petition was filed. It demands that the government

> [i]dentify all reasons why, in a given case, the United States or its officers might exercise discretion not to prosecute a person for whom there exists probable cause to prosecute, identify and describe all documents that refer or relate thereto or are concerned therewith, and identify each and every person with knowledge thereof.

Resp. Fifth Set of Interrogs. 7 (May 13, 2005).

was for the jury, the district court might have agreed with respondent that probable cause is irrelevant and concluded that it was only the questions of motive and causation that were for the jury. It is impossible to tell from the district court's one-paragraph order (Pet. App. 42a). But whatever the basis for the *district court's* decision, the *court of appeals* explicitly held that a prosecution can violate the First Amendment even if it was supported by probable cause, and thus did not reach the question whether there was probable cause for the prosecution of respondent (*id.* at 12a).

There was, moreover, sufficient circumstantial evidence of respondent's guilt, see, *e.g.*, Pet. 4-6, that, if petitioners prevailed on the legal question, either this Court (if it reached the issue) or the court of appeals or district court (on remand) could easily find that there was probable cause for prosecution. Indeed, if this Court ruled for petitioners on the legal question, a showing of probable cause would not be necessary. Petitioners would be entitled to qualified immunity as long as "a reasonable officer could have *believed* that probable cause existed," *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (emphasis added), and, on this record, it was not unreasonable to believe that there was probable cause. At a bare minimum, a conclusion that a retaliatory-prosecution claim cannot proceed when the prosecution was supported by probable cause could substantially limit the scope of proceedings on remand and avoid the need for problematic discovery into prosecutorial motivations.[3]

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[3] Respondent suggests (Br. in Opp. 21-22) that the court of appeals had no jurisdiction over the appeal from the district court's order denying summary judgment. But the court of appeals had "little trouble rejecting [that] argument," Pet. App. 8a, and its decision on that point (*id.* at 7a-9a) is correct. While "determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case," *Behrens* v. *Pelletier*, 516 U.S. 299, 313 (1996), evidentiary sufficiency was not the issue in the court of appeals. The issue was whether,

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

JUNE 2005

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given the "facts the district court, in the light most favorable to the nonmoving party, likely assumed," the challenged conduct violated clearly established law. *Ibid.* (quoting *Johnson* v. *Jones*, 515 U.S. 304, 319 (1995)). As the court of appeals explained, that purely legal question "fall[s] squarely within the collateral order doctrine." Pet. App. 9a.

Respondent also contends that, given the district court's denial of summary judgment on his Federal Tort Claims Act claim against the United States, "a trial centering around [p]etitioners' conduct is all but inevitable," and thus granting them qualified immunity will not protect them from the burdens of trial. Br. in Opp. 22 n.8. But there is a vast difference between being a defendant and being a witness, and the fact that petitioners may have to be witnesses obviously does not disentitle them to the protections afforded by qualified immunity from the far more onerous burdens of being defendants. Cf. *Behrens*, 516 U.S. at 311 (rejecting claim that "no appeal is available where, even if the District Court's [no-]qualified-immunity ruling is reversed, the defendant will be required to endure discovery and trial on matters separate from the claims against which immunity was asserted").

(9)

Supreme Court, U.S.
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No. 04-1495

In the Supreme Court of the United States

MICHAEL HARTMAN, ET AL., PETITIONERS

v.

WILLIAM G. MOORE, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

(VOLUME 1)

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PETITION FOR A WRIT OF CERTIORARI FILED: MAY 9, 2005
CERTIORARI GRANTED: JUNE 27, 2005

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

No. 3:91-cv-02491

WILLIAM G. MOORE, JR., ET AL., PLAINTIFFS

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
11/19/1991	1	COMPLAINT filed; Filing Fee $120.00 Receipt # 40410 (15+) (cle) (Entered: 11/21/1991)
		* * * * *
02/19/1992	26	MOTION by Joseph B Valder, Michael Hartman, Frank Korman, Pierce McIntosh, Robert Edwards, Unknown Robbins, Daniel Harrington to dismiss. (3) (cxb) (Entered: 02/25/1992)
02/19/1992	27	MEMORANDUM by Joseph B Valder, Michael Hartman, Frank Korman, Pierce McIntosh, Robert Edwards, Un

DATE	DOCKET NUMBER	PROCEEDINGS
		known Robbins, Daniel Harrington in support of [26-1] motion to dismiss. (15+) (cxb) (Entered: 02/25/1992)
		* * * * *
04/14/1992	42	BRIEF/MEMORANDUM by Blanche K Moore, William G Moore Jr in opposition to [26-1] motion to dismiss. (15+) (RECEIVED APPENDIX, 2 volumes, 15+, under separate cover) (cxb) (Entered: 04/15/1992)
		* * * * *
05/08/1992	47	REPLY MEMORANDUM by USA, John Does 1-25, Unknown Robbins, Daniel Harrington, Pierce McIntosh, Robert Edwards, Frank Korman, Michael Hartman, Joseph B Valder to response to [26-1] motion to dismiss. (15+) (cxb) (Entered: 05/12/1992)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
05/27/1992	50	SUR-REPLY by Blanche K Moore, William G Moore Jr to reply to response to [26-1] motion to dismiss. (15+) (cxb) (Entered: 05/28/1992)
		* * * * *
09/21/1992	55	MEMORANDUM ORDER granting in part, denying in part [26-1] motion to dismiss . . . that defts' motion to dismiss all constitutional claims brought by Mrs. Moore against the defts is GRANTED; their mtn to dismiss Moore's constitutional claims against Valder is GRANTED; their mtn to dismiss Moore's constitutional claims against Hartman, Korman, Edwards, McIntosh, Harrington, Robbins & other unnamed defts is GRANTED as to the fifth amendment/due process & fair & impartial grand jury claims but is DENIED as to the malicious prosecution and first amendment claims; & their mtn to

DATE	DOCKET NUMBER	PROCEEDINGS
		dismiss for want of personal jurisdiction will be denied in favor of transfer to the District of Columbia . . . accordingly, all claims are transferred to the district of Columbia. (See order for specifics) (signed by AJF) Copies to counsel: 9/21/92 Page(s): 15 (grj) (Entered: 09/22/1992)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:92-cv-02288-RMU

WILLIAM G. MOORE, JR., ET AL., PLAINTIFFS

v.

MICHAEL HARTMAN, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/09/1992	1	ORIGINAL FILE, certified copy of transfer order and docket sheet received from USDC Northern District of Texas, Dallas Division (3-91 CV2491-G); volumes (4) (dot) (Entered: 10/13/1992)
	* * * * *	
11/30/1992	25	MOTION filed by defendant USA to dismiss for lack of jurisdiction; exhibits (3) (dot) (Entered: 12/01/1992)
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
12/14/1992	28	RESPONSE by plaintiff(s) WILLIAM G. MOORE JR., plaintiff(s) BLANCHE K. MOORE in opposition to motion to dismiss for lack of jurisdiction [25-1] by USA; Exhibits (2) (dcn) (Entered: 12/15/1992)
		* * * * *
12/21/1992	32	REPLY by defendant USA in support of motion to dismiss for lack of jurisdiction [25-1] by USA (cjp) (Entered: 12/24/1992)
		* * * * *
03/03/1993	38	STIPULATED ORDER by Judge Norma H. Johnson: consolidating cases (N) (lpp) (Entered: 03/08/1993)
		* * * * *
07/29/1993	43	MOTION filed by defendant in 1:92-cv-02288 to dismiss the inspector defendants (Michael Hartman, Frank Korman, Robert Edwards, Pierce McIntosh, Daniel Harrington and Norman Robbins) (lpp) (Entered: 07/30/1993)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
08/20/1993	45	RESPONSE by plaintiffs BLANCHE K. MOORE in 1:92-cv-02288, and WILLIAM G. MOORE JR. in 1:92-cv-02288 in opposition to motion to dismiss the inspector defendants (Michael Hartman, Frank Korman, Robert Edwards, Pierce McIntosh, Daniel Harrington and Norman Robbins) [43-1] by USA. (bm) (Entered: 08/25/1993)
		* * * * *
09/03/1993	48	REPLY by postal inspector defendants in 1:92-cv-02288, in support of motion to dismiss the inspector defendants (Michael Hartman, Frank Korman, Robert Edwards, Pierce McIntosh, Daniel Harrington and Norman Robbins) [43-1] by USA (bm) (Entered: 09/07/1993)
09/24/1993	49	MEMORANDUM OPINION by Judge Norma H. Johnson (N) (ab) (Entered: 09/28/1993)

DATE	DOCKET NUMBER	PROCEEDINGS
09/24/1993	50	ORDER by Judge Norma H. Johnson: granting motion to dismiss for lack of jurisdiction [25-1] by USA in 1:92-cv-02288, 1:93-00324; granting motion to dismiss the inspector defendants (Michael Hartman, Frank Korman, Robert Edwards, Pierce McIntosh, Daniel Harrington and Norman Robbins) [43-1] by USA in 1:92-cv-02288; denying as moot all other pending motions in these consolidated cases; dismissing these consolidated cases (N) (ab) Modified on 09/28/1993 (Entered: 09/28/1993)
10/22/1993	51	NOTICE OF APPEAL by plaintiff(s) WILLIAM G. MOORE JR. from order dismissing [50-1], order [50-2], entered on: 9/28/93.; $5.00 filing fee and $100.00 docketing fee paid; copies mailed to James E. Anklam, Esq., Richard Montague, Esq, Matthew T. Fricker, Esq. (dmb) (Entered: 10/27/1993)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
03/07/1996	52	CERTIFIED COPY of judgment filed in USCA dated 9/22/95, on appeal [51-1], affirming the judgment of USDC in part., and reversing the judgment of USDC in part, and remanding for further proceedings in part. OPINION USCA # 93-5341 (cjp) (Entered: 03/07/1996)
		* * * * *
04/24/1996	56	SUGGESTION OF DEATH of defendant DANIEL HARRINGTON. . (JMF) (Entered: 04/26/1996)
		* * * * *
05/20/1996	63	ANSWER TO COMPLAINT by defendant FRANK KORMAN. (adc) (Entered: 05/28/1996)
		* * * * *
05/20/1996	65	ANSWER TO COMPLAINT by defendant MICHAEL HARTMAN. (adc) (Entered: 05/28/1996)
05/20/1996	66	ANSWER TO COMPLAINT by defendant ROBERT EDWARDS. (adc) (Entered: 05/28/1996)

DATE	DOCKET NUMBER	PROCEEDINGS
05/20/1996	67	ANSWER TO COMPLAINT by defendant USA. (adc) (Entered: 05/28/1996)
05/20/1996	68	ANSWER TO COMPLAINT by defendant PIERCE MCINTOSH. (adc) (Entered: 05/28/1996)
05/20/1996	69	ANSWER TO COMPLAINT by defendant ROBBINS. (adc) (Entered: 05/28/1996)
		* * * * *
09/13/1996	94	MOTION filed by defendant USA in 1:92-cv-02288 for judgment on the pleadings, or, in the alternative to dismiss for lack of subject matter jurisdiction; Exhibits (5). (lkn) (Entered: 09/16/1996)
		* * * * *
10/15/1996	103	MOTION filed by defendant ROBBINS in 1:92-cv-02288, defendant PIERCE MCINTOSH in 1:92-cv-02288, defendant ROBERT EDWARDS in 1:92-cv-02288, defendant FRANK KORMAN in 1:92-cv-02288,

DATE	DOCKET NUMBER	PROCEEDINGS
		defendant MICHAEL HARTMAN in 1:92-cv-02288 for summary judgment; Exhibit (1). (lkn) (Entered: 10/17/1996)
10/22/1996	104	RESPONSE by plaintiff WILLIAM G. MOORE JR. in 1:92-cv-02288 in opposition to motion for judgment on the pleadings [94-1] by USA, motion to dismiss for lack of subject matter jurisdiction [94-2] by USA; Statement of material facts and attachments (8). (lkn) (Entered: 10/23/1996)
10/22/1996	105	ANSWER TO COMPLAINT by defendant JOSEPH B. VALDER in 1:92-cv-02288. (lkn) (Entered: 10/23/1996)
		* * * * *
11/01/1996	108	REPLY by defendant USA in 1:92-cv-02288 to plaintiff's opposition to motion for judgment on the pleadings [94-1] by USA, motion to dismiss for lack of subject matter jurisdiction [94-2] USA (lkn) (Entered: 11/04/1996)

DATE	DOCKET NUMBER	PROCEEDINGS
11/22/1996	109	RESPONSE by plaintiff WILLIAM G. MOORE JR. in 1:92-cv-02288 in opposition to motion for summary judgment [103-1] by MICHAEL HARTMAN, FRANK KORMAN, ROBERT EDWARDS, PIERCE MCINTOSH, ROBBINS; Attachments (39). (lkn) (Entered: 11/25/1996)
		* * * * *
01/15/1997	115	REPLY by defendant ROBBINS in 1:92-cv-02288, defendant PIERCE MCINTOSH in 1:92-cv-02288, defendant ROBERT EDWARDS in 1:92-cv-02288, defendant FRANK KORMAN in 1:92-cv-02288, defendant MICHAEL HARTMAN in 1:92-cv-02288 in support of motion for summary judgment [103-1] by MICHAEL HARTMAN, FRANK KORMAN, ROBERT EDWARDS, PIERCE MCINTOSH, ROBBINS; Attachments (6). (lkn) (Entered: 01/16/1997)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
03/28/1997	126	MOTION filed by defendant JOSEPH B. VALDER in 1:92-cv-02288 for summary judgment (lkn) (Entered: 03/31/1997)
		* * * * *
05/02/1997	132	RESPONSE by plaintiff WILLIAM G. MOORE JR. 1:92-cv-02288 in opposition to motion for summary judgment [126-1] by JOSEPH B. VALDER.; exhibits (34) (dam) (Entered: 05/05/1997)
		* * * * *
05/19/1997	137	REPLY by defendant JOSEPH B. VALDER in 1:92-cv-02288 to response to motion for summary judgment [126-1] by JOSEPH B. VALDER (dam) (Entered: 05/20/1997)
		* * * * *
06/23/1997	141	MEMORANDUM by plaintiff BLANCHE K. MOORE in 1:92-cv- 02288, plaintiff WILLIAM G. MOORE JR. in 1:92-cv-02288 in connection with the pending summary judgment motions (dam) (Entered: 06/24/1997)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
10/14/1997	144	RESPONSE (SUPPLEMENTAL) by plaintiff BLANCHE K. MOORE in 1:92-cv-02288, plaintiff WILLIAM G. MOORE JR. in 1:92-cv-02288 in opposition to motion for judgment on the pleadings [94-1] USA. (dam) (Entered: 10/16/1997)
10/30/1997	145	RESPONSE by defendant USA in 1:92-cv-02288 to opposition to UNITED STATES motion for judgment on the pleadings [144-1] by WILLIAM G. MOORE JR., BLANCHE K. MOORE (dam) (Entered: 11/04/1997)
02/05/1998	146	ORDER by Chief Judge Norma H. Johnson: granted in part and denied in part the motion to strike affidavit and amended local rule 108(h) statement[131-1]by MICHAEL HARTMAN, FRANK KORMAN, ROBERT EDWARDS, PIERCE MCINTOSH, ROBBINS, granting in part and denying in part

DATE	DOCKET NUMBER	PROCEEDINGS
		motion to strike affidavit and plaintiff's local rule 108 (h) statement [136-1] by JOSEPH B. VALDER, granting motion for summary judgment [126-1] by JOSEPH B. VALDER, denying motion to clarify Order of September 16, 1996, staying discovery [125-1] by WILLIAM G. MOORE JR., denying as moot the motion for summary judgment [103-1] by MICHAEL HARTMAN, FRANK KORMAN, ROBERT EDWARDS, PIERCE MCINTOSH, ROBBINS, granting motion for judgment on the pleadings [94-1] by USA denying as moot the motion to dismiss for lack of subject matter jurisdiction [94-2] by USA; ORDERED that discovery on plaintiff's Bivens claim of retaliatory prosecution against the postal inspectors proceed as indicated in this Opinion; and it is further ORDERED by the Court, sua sponte, that plaintiff's Bivens claim of

DATE	DOCKET NUMBER	PROCEEDINGS
		retalitory prosecution against the postal inspectors be, and hereby is, referred to Magistrate Judge Kay for discovery and pretrial. Unless otherwise ordered by this Court, contested preliminary motions within Local Rule 209 will likewise be heard by Magistrate Judge Kay. All other motions will be heard by the Court. (N) (dam) (Entered: 02/06/1998)
02/05/1998	147	MEMORANDUM OPINION by Chief Judge Norma H. Johnson (N) (dam) (Entered: 02/06/1998)
		* * * * *
06/22/1998	170	MOTION filed by plaintiff BLANCHE K. MOORE in 1:92-cv-02288, plaintiff WILLIAM G. MOORE JR. in 1:92-cv-02288 for reconsideration of order [146-1] , or in the alternative for entry of final judgment; exhibits (4) (tlh) Modified on 06/25/1998 (Entered: 06/25/1998)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
08/14/1998	186	MEMORANDUM by defendant USA in 1:92-cv-02288, defendant JOSEPH B. VALDER in 1:92-cv-02288 in opposition to motion for reconsideration of order [146-1] [170-1] by WILLIAM G. MOORE JR., BLANCHE K. MOORE and in response to motion for entry of final judgment [170-2] by WILLIAM G. MOORE JR., BLANCHE K. MOORE (cjp) (Entered: 08/20/1998)
		* * * * *
09/18/1998	190	REPLY by plaintiff WILLIAM G. MOORE JR. in 1:92-cv-02288 to response to motion for reconsideration of order [146-1] [170-1] by WILLIAM G. MOORE JR., BLANCHE K. MOORE, motion for entry of final judgment [170-2] by WILLIAM G. MOORE JR., BLANCHE K. MOORE (tlh) (Entered: 09/23/1998)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
05/06/1999	200	MEMORANDUM OPINION by Chief Judge Norma H. Johnson (N) (dot) (Entered: 05/07/1999)
05/06/1999	201	ORDER by Chief Judge Norma H. Johnson: denying motion for reconsideration of order [146-1] [170-1] by WILLIAM G. MOORE JR., BLANCHE K. MOORE in 1:92-cv-02288, granting motion for entry of final judgment [170-2] by WILLIAM G. MOORE JR., BLANCHE K. MOORE in 1:92-cv-02288 (N) (dot) (Entered: 05/07/1999)
05/06/1999	202	JUDGMENT by Chief Judge Norma H. Johnson in favor of defendant JOSEPH B. VALDER in 1:92-cv-02288 as to plaintiff's BIVENS claim of retaliatory prosecution; judgment in favor of the USA as to plaintiff's claims of malicious prosecution and abuse of process under the Federal Tort Claims Act. (dot) (Entered: 05/07/1999)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
06/04/1999	204	NOTICE OF INTERLOCUTORY APPEAL by plaintiff WILLIAM G. MOORE JR. in 1:92-cv-02288 from judgment order [202-1] , entered on: 05/07/99; $105.00 FILING FEE PAID; copies mailed to Richard Montague, Andrea W. McCarthy, James E. Anklam, Daniel H. Bromberg, Paul M. Pohl, David F. Legge & Joseph M. David (tb) Modified on 06/07/1999 (Entered: 06/07/1999)
		* * * * *
07/28/2000	219	CERTIFIED COPY of Order filed in USCA dated 6/2/00, referencing appeal [204-1] in 1:92-cv-02288, appeal [34-1] in 1:93-cv-00324, affirming the judgment of USDC in part, and reversing the judgment of USDC in part OPINION USCA # 99-5197 & 99-5198 (cjp) (Entered: 07/28/2000)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
07/30/2001	253	MOTION filed by defendant USA in 1:92-cv-02288 for summary judgment and oral argument requested; exhibits (60) (cjp) (Entered: 07/31/2001)
07/30/2001	254	MOTION filed by defendant ROBBINS in 1:92-cv-02288, defendant PIERCE MCINTOSH in 1:92-cv-02288, defendant ROBERT EDWARDS in 1:92-cv-02288, defendant FRANK KORMAN in 1:92-cv-02288, defendant MICHAEL HARTMAN in 1:92-cv-02288 for summary judgment and oral argument requested; exhibits (60) (cjp) (Entered: 07/31/2001)
		* * * * *
12/07/2001	267	MEMORANDUM by plaintiffs in 1:92-cv-02288 in opposition to motion for summary judgment and oral argument requested [254- 1] by MICHAEL HARTMAN, FRANK KORMAN, ROBERT EDWARDS, PIERCE MCINTOSH, ROBBINS; (FILED UNDER SEAL IN ROOM 1800) Volumes 1-10 (bjsp) (Entered: 12/13/2001)

DATE	DOCKET NUMBER	PROCEEDINGS
12/07/2001	268	MEMORANDUM by plaintiffs in 1:92-cv-02288 in opposition to motion for summary judgment and oral argument requested [253-1] by USA; (FILED UNDER SEAL IN ROOM 1800); volumes 1-10 (bjsp) (Entered: 12/13/2001)
	* * * * *	
02/28/2002	272	REPLY by defendant ROBBINS in 1:92-cv-02288, defendant PIERCE MCINTOSH in 1:92-cv-02288, defendant ROBERT EDWARDS in 1:92-cv-02288, defendant FRANK KORMAN in 1:92-cv-02288, defendant MICHAEL HARTMAN in 1:92-cv-02288 in support of motion for summary judgment and oral argument requested [254-1] by MICHAEL HARTMAN, FRANK KORMAN, ROBERT EDWARDS, PIERCE MCINTOSH, ROBBINS; exhibits (1) (cdw) (Entered: 03/04/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
02/28/2002	273	REPLY by defendant USA in 1:92-cv-02288 in support of motion for summary judgment and oral argument requested [253-1] by USA; exhibits (2) (cdw) (Entered: 03/04/2002)
		* * * * *
08/05/2003	283	ORDER by Judge Norma H. Johnson: denying defendant's motion for summary judgment (N) (adc) (Entered: 08/06/2003)
		* * * * *
09/04/2004	284	NOTICE OF APPEAL by defendant ROBBINS in 1:92-cv-02288, defendant PIERCE MCINTOSH in 1:92-cv-02288, defendant ROBERT EDWARDS in 1:92-cv-02288, defendant FRANK KORMAN in 1:92-cv-02288 from order [283-1], entered on: August 05, 2003. No fee paid. U.S. Gov't. (jf) (Entered: 09/08/2003)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
03/31/2004	291	First MOTION for ruling re [271] Motion to Strike by UNITED STATES OF AMERICA. (Attachments: # 1 Text of Proposed Order) (McCarthy, Andrea) (Entered: 03/31/2004)
03/31/2004	292	MOTION for Reconsideration re 283 Order denying defendant's motion for summary judgment (for scanned image, see Doc. 291) by UNITED STATES OF AMERICA. (cp,) (Entered: 04/01/2004)
04/14/2004	293	Memorandum in opposition to motion re 291 *ruling on motion to strike and reconsideration of order entering summary judgment* filed by WILLIAM G. MOORE JR.. (Attachments: #1 Exhibit A #2 Text of Proposed Order) (Bromberg, Daniel) (Entered: 04/14/2004)
04/23/2004	294	REPLY to opposition to motion re 291 filed by UNITED STATES OF AMERICA. (McCarthy, Andrea) (Entered: 04/23/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
08/30/2004	295	ORDER denying 291 Motion for Ruling, denying [292] Motion for Reconsideration. Signed by Judge Ricardo M. Urbina on 8/30/04. (Entered: 08/30/2004)
08/30/2004	296	MEMORANDUM OPINION. Signed by Judge Ricardo M. Urbina on 8/30/04. (Entered: 08/30/2004)
		* * * * *
04/04/2005	306	USCA JUDGMENT (certified copy) as to [284] Notice of Appeal, filed by FRANK KORMAN,, ROBERT EDWARDS,, PIERCE MCINTOSH,, ROBBINS; It is hereby ordered and adjudged that the judgment of the District Court appealed from in this cause is hereby affirmed and case remanded; USCA#03-5241 (jsc) (Entered: 04/11/2005)
		* * * * *

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5241

WILLIAM G. MOORE, JR., PLAINTIFF-APPELLEE

v.

MICHAEL HARTMAN, ET AL., DEFENDANT-APPELLANTS

DOCKET ENTRIES

DATE	PROCEEDINGS
9/8/03	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Michael Hartman, Appellant Frank Korman, Appellant Robert Edwards, Appellant Pierce McIntosh, Appellant Norman Robbins. [770895-1] (sha)
	* * * * *
10/27/03	MOTION filed (with an attached appendix) by the Appellee William G. Moore, Jr. (certificate of mail service dated 10/27/03) to dismiss this appeal for want of jurisdiction [781120-1]. Response due by 11/10/03. (jth)
	* * * * *
11/17/03	OPPOSITION filed [785550-1] (5 copies) by the Appellants Michael Hartman, et al., (certificate of mail service dated 11/17/03) to plantiff/appellee's motion to dismiss appeal for want of jurisdiction [781120-1]. (jth)

DATE	PROCEEDINGS
	* * * * *
12/12/03	REPLY filed [791284-1] (5 copies) by Appellee William G. Moore (certificate of mail service dated 12/12/03) to a response to the motion dismiss case lack/jurisdiction [781120-1]. (sha)
2/20/04	PER CURIAM ORDER filed [804620] referring motion to dismiss to the merits panel to which this case is assigned. The parties are directed to address in their briefs the issues presented in the motion to dismiss rather than incorporate those arguments by reference. The Clerk is instructed to calendar this case for presentation to a merits panel. Before Judges Sentelle, Rogers. [Entry Date: 2/20/04] (jlp)
	* * * * *
5/3/04	BRIEF filed by Appellant Michael Hartman, et al. [820319-1]. Copies: 8. Certificate of mail service date 5/3/04. (sha)
	* * * * *
6/16/04	BRIEF filed by the Appellee William G. Moore [829741-1]. (Copies: 7). Certificate of mail service dated 6/16/04. (jth)
	* * * * *

DATE	PROCEEDINGS
7/2/04	CORRECTED REPLY BRIEF filed by Appellants Michael Hartman, et al., [834108-1]. (Copies: 7). Certificate of service by mail dated 7/2/04. (jth)
7/7/04	FINAL BRIEF filed by Appellants Michael Hartman, et al., [834427-1]. (Copies: 15). Certificate of service by mail dated 7/7/04. (jth)
7/7/04	FINAL BRIEF filed by Appellee William G. Moore [834428-1]. (Copies: 15). Certificate of mail service dated 7/7/04. (jth)
7/7/04	FINAL REPLY BRIEF filed by Appellants Michael Hartman, et al., [834430-1]. (Copies: 15). Certificate of mail service dated 7/7/04. (jth)
7/7/04	DEFERRED APPENDIX (VOLUMES I - II) filed by the Appellants Michael Hartman, et al., [834431-1]. (Copies: 10). Certificate of mail service dated 7/7/04. (jth)
	* * * * *
9/15/04	ORAL ARGUMENT HELD before Sentelle, Tatel, Williams. (set)
11/9/04	JUDGMENT that the decision of the district court be affirmed and the case remanded for the reasons in the accompanying opinion. Before Judges Sentelle, Tatel, Williams. [Entry Date: 11/9/04] (mcm)

DATE	PROCEEDINGS
11/9/04	OPINION filed [858768] (26 pgs) for the Court by Judge Tatel (mcm)
11/9/04	CLERK'S ORDER filed [858770] The Clerk is directed to withhold issuance of the mandate [858770-1] pending disposition of any timely petition for rehearing. [Entry Date: 11/9/04] (mcm)
	* * * * *
11/22/04	MOTION filed (5 copies) by Appellant Michael Hartman, et al. (certificate of mail service dated 11/22/04) for clarification [863886-1] of clerk order withholding mandate [858770-1]. (sha)
12/7/04	PER CURIAM ORDER filed [863989] granting motion clarify filed by Michael Hartman, et al. [863886-1]. Any petition for rehearing and/or petition for rehearing en banc is due on December 27, 2004. An explanation will issue at a later date. Before Judges Sentelle, Tatel, Williams. [Entry Date: 12/7/04] (mcm)
12/27/04	PETITION filed (Copies: 19) by Appellants Michael Hartman, et al. (certificate of service dated 12/27/04) for rehearing en banc [868240-1]. (mcm)

DATE	PROCEEDINGS
1/31/05	PER CURIAM ORDER, In Banc, filed [873717] denying petition rehearing en banc [868240-1] filed by Michael Hartman, Kormann, Robert Edwards, Pierce McIntosh, Norman Robbins. (Mandate may issue on or after 2/8/05). Before Judges Ginsburg, Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland,* Roberts, Williams. (Circuit Judge Garland did not participate in this matter) [Entry Date: 1/31/05] (mcm)
	* * * * *
2/4/05	MOTION filed (5 copies) by Appellants Michael Hartman, et al., (certificate of service by mail dated 2/4/05) for stay of issuance of the mandate [875542-1]. Response due by 2/22/05. (jth)
2/16/05	RESPONSE filed [878670-1] (5 copies) by Plaintiff/Appellee William G. Moore (certificate of mail service date 2/16/05) to appellants' motion for stay of issuance of the mandate [875542-1]. (jth)
2/28/05	REPLY filed [880891-1] (5 copies) by Federal Appellants Michael Hartman, et al., (certificate of service by mail dated 2/28/05) in support of their motion for stay of the issuance of the mandate [875542-1]. (jth)

DATE	PROCEEDINGS
3/8/05	PER CURIAM ORDER filed [882336] granting motion stay mandate filed by Michael Hartman, et al. [875542-1]. The Clerk is directed to withhold issuance of the mandate [882336-1] until 3/17/05. Before Judges Sentelle, Tatel, Williams. [Entry Date: 3/8/05] (mcm)
3/14/05	MOTION filed (5 copies) by Appellants Michael Hartman, et al., (certificate of mail service dated 3/14/05) to extend the stay of issuance of mandate [884312-1]. Response due by 3/28/05. (jth)
3/16/05	PER CURIAM ORDER filed [884340] denying motion stay mandate [884312-1] filed by Michael Hartman, et al. Before Judges Sentelle, Tatel, Williams. [Entry Date: 3/16/05] (mcm)
3/31/05	MANDATE ISSUED to Clerk, District Court [886985-1] (mcm)
	* * * * *
5/13/05	NOTICE filed by Clerk, Supreme Court advising of the filing on 5/9/05 & docketing on 5/10/05 of a petition for writ of certiorari [894713-1]. Supreme Court Docket No. 04-1495. (jth)

DATE	PROCEEDINGS
7/1/05	NOTICE filed by William K. Suter, Clerk, informing the court that the petition for writ of certiorari was granted limited to Question 1 presented by the petition, No. 04-1495 [908623-1]. (lvs)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-91CV2491-G

WILLIAM G. MOORE, JR. AND
BLANCHE K. MOORE, PLAINTIFFS

v.

JOSEPH B. VALDER, MICHAEL HARTMAN, FRANK KORMAN, ROBERT EDWARDS, PIERCE MCINTOSH, DANIEL HARRINGTON, (FIRST NAME UNKNOWN) ROBBINS, AND OTHERS AS OF YET UNKNOWN, HEREBY DESIGNATED AS JOHN DOE DEFENDANTS 1-25

[Filed: Nov. 19, 1991]

ORIGINAL COMPLAINT

I. JURISDICTION AND VENUE

1. The jurisdiction of this Court is invoked under Title 28 U.S.C. §§ 1331 and 1367(a). This suit is authorized by the First, Fourth and Fifth Amendments of the Constitution of the United States and such other State and Federal laws as may be applicable. Venue in this action is properly situated in the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. §§ 1391(b) and (e). Plaintiffs seek damages in excess of $50,000 for injuries sustained by them which were caused by the actions of the defendants.

II. PARTIES

2. Plaintiff William G. Moore, Jr. is a citizen of the United States who resides in Dallas, Texas. Plaintiff is

the former Chairman, President and Chief Executive Officer of Recognition Equipment Incorporated ("REI").

3. Plaintiff Blanche K. ("Chelen") Moore is the wife of Plaintiff William G. Moore, Jr. and resides with him in Dallas, Texas.

4. Defendants are employees of the United States Government and its agencies, including the United States Department of Justice and the United States Postal Service ("USPS"), who, acting in their ministerial and individual capacities, did conspire to interfere with and violate, and did interfere with and violate, plaintiffs' rights and privileges, and did deprive Plaintiff William G. Moore, Jr. of his liberty and both plaintiffs of their property without due process of law, in conflict with the laws and Constitution of the United States and the laws of the State of Texas and the District of Columbia, as more fully appears herein below. Such defendants include:

a. Defendant Joseph Valder, who was at all relevant times an Assistant U.S. Attorney for the District of Columbia. Said defendant was responsible for the investigation and the overseeing of the Grand Jury investigation which culminated in the wrongful indictment of Plaintiff William G. Moore, Jr. Defendant Valder, acting individually and/or in concert with the other defendants, also was responsible for the pre-trial activities and trial of the case against Plaintiff William G. Moore, Jr. Said defendant is sued in his individual capacity.

b. Defendants Frank Korman, Michael Hartman, Robert Edwards, Pierce McIntosh, Daniel Harrington (first name unknown) Robbins, and Postal

Inspectors and other employees of the USPS who are presently unknown to plaintiffs (and hereinafter are referred to as "John Doe defendants 1-25"), and who were at all relevant times Postal Inspectors of the United State Postal Inspection Service or otherwise employed by the USPS. Defendants Korman and Hartman oversaw the investigation and were involved at all relevant stages. Each defendant Postal Inspector is sued in his own individual capacity. All of the defendant Postal Inspectors, whether known or unknown, shall be referred to collectively as "Postal Inspectors."

III. NATURE OF THIS CASE

5. The incidents on which plaintiffs' lawsuit is based occurred as a result of malicious, deliberate, intentional, reckless and negligent misconduct by Assistant United States Attorney Joseph Valder and the U.S. Postal Inspection Service and its agents, as named and/or described above, before, during, and after a Grand Jury investigation which culminated in an indictment being returned against Plaintiff William G, Moore, Jr., REI, and another employee of REI on October 6, 1988 in Washington, D.C. All defendants in the indictment were acquitted of all charges by United States District Judge George Revercomb on November 20, 1989. It became apparent that the investigation, Grand Jury proceedings and handling of the post-indictment proceedings by the defendants were punctuated by gross violations and abuses of plaintiffs' rights as detailed below.

6. This action is brought to seek fair compensation for the catastrophic financial injury, humiliation, mental suffering and anguish inflicted upon plaintiffs as a result of the wrongful acts of defendants. This action is

also filed to ensure that these defendants and others are deterred from engaging in such wrongful activity again.

IV. FACTS

7. Plaintiff William G. Moore, Jr. is the former Chairman, Chief Executive Officer and President of REI. He is a graduate of Georgetown University and has served on its Board of Regents. He served in the U.S. Army, obtaining the rank of Captain, and saw service in Vietnam. REI was a manufacturer of, among other products, optical character recognition ("OCR") systems. The Company was at all relevant times headquartered in Irving, Texas. At the time Moore joined REI in 1982, the company, which had suffered losses for five years, had lost $14.2 million in the preceding year and was on the verge of bankruptcy. Within one year, Moore had turned REI around, and REI reported net income of $9.5 million. By 1985, REI had reached $241.8 million in revenues, and it was considered one of the most dynamic and successful publicly-held corporations in the Dallas area. Because of his success, Moore was the recipient of various significant honors from organizations across the country, including being named Dallas Business Man of the Year. He served as Chairman of the American Electronics Association and or the Boards of various civic and charitable organizations.

8. REI had developed multi-line optical character reading ("MLOCR") equipment which would automatically read several lines of an address to code and assign a nine-digit zip code to a piece of mail. REI desired to sell the product to USPS. REI believed it would speed up the mail system and save USPS millions of dollars per year.

9. At the time relevant to the charges in the indictment, USPS was employing single-line OCR equipment which could only read the bottom line of an address, and the efficiency of single-line technology was dependent upon the public use of the nine-digit zip code. The, single-line OCR technology was not successful because the public use of the nine-digit zip code did not meet LISPS' expectations. Since the indictment, USPS has converted its automated sorting equipment to multi-line technology.

10. At the time of Moore's arrival at REI, there had been a longstanding conflict between REI and various senior managers within USPS. In late 1983, then, Postmaster General William Bolger announced that there would be no future for multi-line technology in the automation plans of USPS. One high-ranking postal manager stated that REI would never receive any multi-line production awards as long as he was with USPS.

11. After the single-line decision by USPS, Plaintiff William G. Moore, Jr. informed Postmaster General Bolger that single-line technology was an unsound strategy, and that Moore intended to go directly to USPS Board of Governors, the media, and the United States Congress to try and stop the ineffective and wasteful single-line implementation. Moore did, in fact, —as he was Constitutionally permitted to do—communicate about the subject with various Congressmen and Senators, including Texas Congressmen Jack Brooks and the late Mickey Leland, Missouri Congressman Richard Gephardt and Alaska Senator Ted Stevens. As previously noted, USPS now uses the multi-line approach advocated by REI.

12. In the course of REI's efforts to obtain contracts from USPS, which was supposed to review in an open, fair and impartial manner all competing technologies for mail scanning and sorting equipment, REI hired the consulting firm of Gnau and Associates, Inc. ("GAI"). John Gnau was a principal of GAI. The use of this consulting firm had been suggested to REI by a member of the USPS Board of Governors.

13. In early 1985, the U.S. Postal Inspection Service began an investigation into possible illegal payments from Gnau to Peter E. Voss, then a member of the USPS Board of Governors. It was later determined that a conspiracy in which Gnau made illegal payments to Voss existed between Voss, John Gnau, Michael Marcus (the Treasurer of GAI) and William Spartin (President of GAI). Voss, Gnau and Marcus pled guilty to criminal charges. Spartin and Sharon Peterson, an administrative assistant to Voss, agreed to cooperate in exchange for immunity from prosecution. Frank Bray, REI's Vice President of Distributor Sales, also received immunity.

14. During the investigation, Defendant Valder and the Postal Inspectors, including at least Defendants Hartman and Korman as well as various other unknown defendants, desperately tried to find a way to link William G. Moore Jr., to the conspiracy. However, the evidence clearly and unequivocally demonstrated that Moore knew absolutely nothing about the conspiracy. None of the thousands of documents subpoenaed by the Grand Jury during the investigation indicated that Moore, or for that matter REI, had knowledge of the conspiracy and related unlawful activities. Moore repeatedly informed the Postal Inspectors and AUSA Valder that he had no knowledge of the conspiracy.

None of the five admitted conspirators—Voss, Gnau, Marcus, Peterson and Spartin—gave any testimony even remotely indicating that Moore knew of, or participated in, that conspiracy. In fact, several conspirators testified at trial that they actively tried to disguise the conspiracy from Moore and had previously told that to Valder and certain of the other defendants.

15. The obvious issue in any criminal action against Moore would be whether he had knowledge of and participated in the conspiracy or the unlawful acts of the consultants and Voss. The evidence gathered in the massive investigation showed clearly and without exception that Moore had no knowledge of the conspiracy or the unlawful acts. The Postal Inspectors and AUSA Valder knew that such lack of knowledge would prevent the return of any proper indictment against Moore. Notwithstanding the above, Defendants Valder, Hartman, Korman, Edwards, McIntosh, Harrington, Robbins, and the John Doe defendants who are presently unknown to plaintiffs, deliberately, systematically and without regard to Moore's Constitutional right to fair investigation and fair consideration by the Grand Jury, concealed from the Grand Jury crucial and extensive exculpatory testimony from the co-conspirators (Gnau, Peterson, Marcus, Spartin and Voss) that Moore was not told about, and did not know about, the unlawful scheme to pay kickbacks to Voss.

16. Defendants engaged in unusual, unlawful and unconstitutional investigative techniques to intimidate and coerce witnesses to try to implicate Moore and to control the flow of information to the Grand Jury in order to mislead the Grand Jury to return an indictment when none was warranted. These activities were done in clear disregard of the defendants' obligations as

employees of the United States; these activities were done by defendants with malice and in clear violation of Moore's right to a fair investigation; these activities were done by defendants in an attempt to obtain publicity for themselves and seek career advancement; and these unlawful activities were done by defendants in an attempt to "punish" Moore for exercising his constitutionally-protected rights to criticize USPS procurement decisions.

17. By concealing and distorting the evidence as they did, AUSA Valder and the Postal Inspectors acted outside their discretion, violated their employer's policies and procedures, and knowingly violated plaintiffs' clearly established Constitutional rights. The methods designed by the defendants to withhold key exculpatory evidence and to manufacture false and misleading testimony are detailed below.

18. AUSA Valder and the Postal Inspectors drafted and used written "witness statements" to shape the evidence presented to the Grand Jury. These misleading "witness statements" were false, inaccurate, incomplete and misleading and were presented to the Grand Jury even though live witnesses were available to testify. Even though all the witnesses told AUSA Valder and the Postal Inspectors that Moore was unaware of the conspiracy, not one single witness statement written by the Postal Inspectors included this crucial, exculpatory statement. Additionally, AUSA Valder and the Postal Inspectors refused to allow witnesses to amend these statements, even though it was supposedly the witnesses', not the Postal Inspectors', statements. These statements were thereafter presented to the Grand Jury as the witnesses' own statements. For example, Frank Bray was interviewed several times in an

intimidating fashion by the Postal Inspectors, including Inspectors Edwards and Harrington, in an attempt to have him change his testimony that Moore was unaware of the conspiracy. Incredibly, AUSA Valder and the Postal Inspectors refused to allow Bray to include in "his" statement that, to his knowledge, REI and Moore were not aware of the payoffs. Bray and his attorney Ellen Huvelle (now a Judge on the Superior Court of the District of Columbia) amended their version of Bray's statement to include such language, but the Postal Inspectors refused to change it. Moreover, Bray and Ms. Huvelle were not permitted to take the amended version of Bray's statement with them after their meeting with the Postal Inspectors, and the amended version mysteriously disappeared by the time of trial. The Grand Jury was thereafter read the statement written by the Postal Inspector, which purported to be Bray's statement, without the exculpatory statement. Additionally, AUSA Valder promised Bray and Ms. Huvelle that he would ask Bray the key questions about Moore's knowledge in the Grand Jury, but Valder thereafter refused to do so.

19. John Gnau and Peter Voss were the two leaders of the conspiracy. Gnau repeatedly told the Postal Inspectors that he never told Moore about his illicit relationship with Voss. However, "his" statement written by the Postal Inspectors deliberately omitted this fact. Voss, who was serving a prison sentence on these charges and was clearly available to the Government, was never called by the Government to testify at trial.

20. Despite the fact that Postal Inspectors are trained to take detailed notes, virtually none of the notes taken by Postal Inspectors during their interviews of various witnesses contained the witnesses'

crucial statements to the effect that Moore was not told of the conspiracy. These key statements were deliberately omitted by the Postal Inspectors in order to avoid their responsibility to conduct a fair investigation and to preserve exculpatory material.

21. AUSA Valder and the Postal Inspectors threatened and intimidated William Spartin in an attempt to coerce incriminating testimony from him after he repeatedly told the Government that to his knowledge, Moore did not know of the payoffs to Voss. Such tactics included a pre-planned tearing-up of Spartir's immunity letter in front of him and threats to prosecute Spartin's son. This was despite the fact that a lie detector test had indicated that Spartin was being truthful when he said Moore and REI were not informed of the conspiracy. Moreover, unbeknownst to Spartin, the lie detector test was conducted by Inspector Robbins, who repeatedly tried to trick and coerce Spartin into giving incriminating testimony against Moore.

22. AUSA Valder and the Postal Inspectors, including Inspector McIntosh, violated Federal Rule of Criminal Procedure 6(e)(2), which protects the secrecy of Grand Jury proceedings, by giving Spartin and former Postmaster General Paul Carlin access to the Grand Jury testimony of other witnesses for the purpose of influencing Spartin's testimony and for the apparent purpose of assisting Carlin, a private plaintiff, to pursue civil litigation in connection with his dismissal from the Postal Service. The Postal Inspectors even gave Carlin a copy of a draft indictment for his review.

23. AUSA Valder deliberately withheld *Brady v. Maryland* exculpatory material from attorneys for Moore and REI before and during their trial, despite a court order to turn over even "borderline" *Brady*

material. Such *Brady* material included the results of lie detector tests in which Mr. Spartin made 19 references to Moore's and REI's lack of knowledge as to the conspiracy, and the amended version of Frank Bray's statement in which he added a paragraph that to his knowledge, Moore and REI were unaware of the payoffs. If this material had been turned over to the defense as it should have been, Moore would likely have been spared the expense and humiliation of a long, extensively publicized trial.

24. Through the use of the above malicious, improper and unconstitutional tactics, AUSA Valder and the defendant Postal Inspectors were able to obtain an indictment against William G. Moore, Jr. However, nowhere in the 46-page conspiracy charge—nowhere in its 10 objects, 58 means and methods or 96 overt acts—did the charge allege that Moore or REI even know that GAI was paying bribes to Voss, much less that they agreed to these payments. This deliberate attempt to hide the only real issue in the indictment by pure volume and verbosity was not successful. Following the Government's presentation of its case at trial, Judge George Revercomb acquitted Moore and all other defendants.

25. After the indictment, REI was debarred from all postal procurements. The United States forced REI to place Moore on leave of absence and to sever him from any management involvement with REI. As a result of the indictment, the Company began to flounder and the stock price plunged. The company was eventually the subject of a takeover attempt, had a change of control and Plaintiff William G. Moore, Jr. lost his job. The wrongful investigation/indictment and prosecution prevented REI from bidding, and in all probability win-

ning, hundreds of millions of dollars in postal automation contracts. The wrongful investigation/indictment caused the plaintiffs to sustain severe financial injury.

26. Following the indictment, Plaintiff William G. Moore, Jr. was subjected to the various aspects of criminal justice system processing, including arraignment and fingerprinting. He was processed not once, but twice; one time by the Postal Inspectors, and the second time by the District of Columbia police. He was briefly jailed in the District of Columbia during this processing.

27. There was a tremendous amount of media publicity during the unlawful investigation, following the indictment and during the trial, all of which caused plaintiffs humiliation, physical and mental suffering and anguish, and which required medical treatment for both plaintiffs.

28. The indictment named as part of the overt acts of the conspiracy such Constitutionally protected actions as the plaintiffs' lobbying of Congress for changes to the mail system. The defendants also sought to prosecute Plaintiff William G. Moore, Jr. for suggesting qualified candidates for the position of Postmaster General, even though he had been requested to do so by the White House and was Constitutionally entitled to do so.

29. As a result of the above-described unlawful activity and violations of plaintiffs' Constitutional rights, plaintiffs suffered and continue to suffer great financial losses, humiliation, embarrassment, physical and mental suffering, as well as loss of reputation in and among business associates, friends, and family.

30. As a result of the above-described unlawful activity and violations of plaintiffs' Constitutional rights,

including voluminous unreasonable requests for personal and business documents, including tax returns and bank records, and alleged surveillance and possibly wiretaps, defendants did invade the privacy of the plaintiffs and cause them injury.

31. AUSA Valder and the Postal Inspectors are not entitled to official immunity for the following reasons:

a. The actions of AUSA Valder and the Postal Inspectors and the John Doe defendants violated clearly established Constitutional rights which a reasonable person would have known and recognized.

b. AUSA Valder and the Postal Inspectors and the John Doe defendants took the described actions with the malicious intention to cause injury to plaintiff and to cause deprivation of plaintiffs' constitutional rights.

c. AUSA Valder and the Postal Inspectors had no discretion to act as they did since they violated, ignored and otherwise failed to comply with regulations and policies designed to guide their actions. The investigative tactics used were so extreme that no reasonable person would accept them as fair and lawful.

d. The Postal Inspectors undertook certain unlawful and improper actions on their own accord without direction from their supervisors or the United States Attorney's Office, including the disclosure of secret Grand Jury material or witnesses, as stated in the United States Department of Justice Office of Professional Responsibility's letter dated May 30, 1991.

e. AUSA Valder acted in an investigative capacity during the course of the investigation, thereby losing his objectivity and violating his duty to fairy uphold the laws of the United States.

f. AUSA Valder acted in a non-advocatory role during the investigation, especially when he withheld, and failed to preserve, exculpatory evidence.

g. AUSA Valder continually provided inaccurate and misleading legal advice to the Postal Inspectors investigating the case.

FIRST CAUSE OF ACTION

32. By the aforesaid withholding of exculpatory evidence and by the presentation of false and misleading evidence to the Grand Jury, the defendants deprived the plaintiffs of their rights to due process and to an informed, fair and impartial Grand Jury as guaranteed by the Fifth Amendment of the United States Constitution.

SECOND CAUSE OF ACTION

33. The aforesaid actions of defendants constituted a slander and defamation of Plaintiff William G. Moore, Jr. The actions taken also constituted an unlawful invasion of plaintiffs' privacy, false arrest and abuse of process and malicious prosecution, all in violation of the laws of the State of Texas and of the District of Columbia, which this court may adjudicate as pendant to the other four, causes of action.

THIRD CAUSE OF ACTION

34. By the aforesaid improper and malicious activities, the defendants deprived the plaintiffs of their property without due process of law as guaranteed by

the Fifth Amendment to the United States Constitution.

FOURTH CAUSE OF ACTION

35. By the aforesaid improper and malicious activities, the defendants deprived the plaintiffs of their rights to be free from unreasonable seizures as guaranteed by the Fourth Amendment of the United States Constitution, in that Plaintiff William G. Moore, Jr. was seized as he awaited processing, and furthermore, plaintiffs were forced to post bond and attend a trial based upon the improperly obtained indictment.

FIFTH CAUSE OF ACTION

36. By the aforesaid improper and malicious activities, which caused plaintiffs to deplete financial and human resources, the defendants attempted to punish Plaintiff William G. Moore, Jr. because he directed criticism against the USPS, thereby depriving the Plaintiffs of their rights to free expression and to petition the government for redress of grievances guaranteed by the First Amendment of the United States Constitution.

DAMAGES

37. As a result of the investigation and indictment, REI stock, of which Plaintiff William G. Moore, Jr. owned more than 100,000 shares, dropped from about $22 per share to about $5 per share. A change of control at REI occurred during the trial which would not have taken place if there had not been an indictment. As a result, Plaintiff William G. Moore, Jr. lost his job and suffered extensive financial injury.

38. In the three years prior to the indictment, Plaintiff William G. Moore, Jr.'s average compensation was

more than $1 million per year. After the indictment, the value of Moore's stock ownership declined from $2 million to $500,000. Plaintiff William G. Moore, Jr.'s stock options decreased in value by at least another $2 million, and his annual income was, and has been, greatly reduced.

39. As further result of the indictment, Plaintiff William G. Moore, Jr. has been unable to find a position comparable to his previous employment. Plaintiff's reputation has been damaged, and he has been forced to resign from a number of boards and appointments.

40. The ordeal of investigation, indictment and trial has exacted a terrible physical and emotional toll on plaintiffs. Shortly after being notified of the impending indictment in late summer of 1988, Plaintiff William G. Moore, Jr. was treated at the emergency room at Parkland Hospital in Dallas for symptoms which were subsequently diagnosed as an acute stress reaction. Since the investigation began, Plaintiff Blanche Moore has suffered from chronic insomnia combined with Temporomandibular joint disorder (often called TMJ). She is currently under physician's care for chronic neck, back and leg pains.

41. WHEREFORE, Plaintiffs request this Court to assess compensatory damages against each defendant, jointly and severally, in at least the following amounts, and which amounts will be proven in detail at trial of this action:

(a) Lost Earnings—$17 million;

(b) Decrease in value of stock and stock options —$5 million;

(c) Personal suffering, humiliation and emotional distress—$10 million; and

(d) An amount adequate to compensate Mr. Moore for defense costs incurred during the investigation and trial.

42. In order to deter defendants and others from engaging in such unlawful and unconstitutional activities, Plaintiffs further request punitive damages against each defendant, plus costs and attorneys' fees, and any other and further relief as the Court may deem just and equitable.

DEMAND FOR JURY TRIAL

43. Plaintiffs hereby demand a trial by jury of all issues so triable in this cause of action.

Respectfully submitted,

JONES, DAY, REAVIS & POGUE

/s/ JEAN M. PERRON

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92cv2288 (NHJ) (AK)
(consolidated with No. 93cv0324(NHJ)(AK))

WILLIAM G. MOORE, JR., PLAINTIFF

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

DEFENDANT POSTAL INSPECTORS' CONCISE STATEMENT OF MATERIAL FACTS NOT GENUINELY IN DISPUTE

Pursuant to District of Columbia Local Civil Rule ("LCvR") 7.1(h), the defendants Michael Hartman, Frank W. Korman, Pierce McIntosh, Robert Edwards and Norman Robbins submit in support of their Motion for Summary Judgment the following concise statement of material facts not genuinely in dispute:

1. The United State Postal Inspection Service investigated allegations of procurement fraud in connection with the Postal Service's acquisition of optical character reader equipment for use in processing mail. Hartman Declaration ("Decl."), Exhibit (Ex.) B ¶ 3: Korman Decl. (Ex. K) ¶ 3; Edwards Decl. (Ex. D) ¶ 12.

2. The investigation began in July, 1985 when Deputy Postmaster General Jackie Strange made to the Chief Inspector allegations about United States Postal Governor Peter E. Voss. Ex. D¶¶ 3, 7 - 8.

3. Strange told Chief Inspector Clauson that she thought Voss was showing an unusual degree of inter-

est in automation and OCR acquisition and seemed suspicious. *Id.* ¶ 7.

4. Chief Clauson told Inspector Robert Edwards, then working on an audit project regarding the OCR program, to keep a close watch on the procurement. *Id.*¶ 2.

5. The Inspection Service received in the Fall, 1985, an allegation from officials of AEG Telefunken that plaintiff Moore proposed splitting two pending OCR procurements. Ex. B ¶¶ 11-13, Ex. D, ¶¶ 9-10.

6. Moore was President, CEO and eventually Chairman of the Board of REI. Reedy was a Senior Vice President, who reported directly to Moore. Complt. ¶ 2; Ex. B ¶¶ 5-6 and Ex. 1 thereto.

7. Inspectors learned in their investigation that in 1984, the Postal Service elected to purchase "single line" OCRs and to wait until 1987 to decide whether to deploy "multi-line" OCRs. Ex. D ¶ 4.

8. Inspectors learned in their investigation that in mid-1985, Postmaster General ("PMG") Paul N. Carlin announced that the Postal Service would immediately take steps to move to a multiline OCR environment. Inspectors also learned that PMG Carlin also announced that the Postal Service would obtain multiline read capability through competitive procurements. Ex. D ¶ 6; Carlin Trial Testimony (Ex. F) at 2099, 2106-07.

9. Inspectors also learned that the Postal Service announced new procurements for both multiline OCRs ("Phase III" procurement) and for kits to retrofit newly-acquired single line OCRs (acquired in "Phase II). The latter procurement was the "Phase IIA" procurement. Ex. D, ¶ 6. Ex. F, ¶ 5. The total value of

the potential contracts was between $250 and $400 million. Ex. D, ¶ 17.

10. Inspectors learned that Electrocom Automation ("ECA") of Arlington. Texas had won the 1984 "Phase II" single line competition and that the ECA single line OCR employed technology licensed from AEG Telefunken, a West German company. Inspectors also learned that ECA had entered the Phase IIA retrofit competition along with the Phase III competition. Ex. D, ¶ 9.

11. Inspectors also learned that REI entered the Phase IIA and Phase III competitions. *Id.*

12. Inspectors learned that REI had competed in the Phase II single line procurement, but was not awarded a contract. *Id.*

13. Inspectors learned that REI required some technical information if it was to develop a kit to retrofit the ECA Phase II single line OCR. Ex. B, ¶ 10.

14. Inspectors learned that a meeting between REI and AEG was called in the Fall, 1985 with the topic being the technical information REI claimed to need. *Id.*

15. AEG officials subsequently alleged to the Inspection Service that at this meeting Moore proposed that the two companies split the pending procurements with ECA and Telefunken getting the contract to retrofit the single line machines and REI getting the contract to manufacture new multiline OCRs. The AEG officials also alleged to the Inspection Service that Moore also threatened to use his political clout to kill the retrofit program if AEG did not go along with his proposal. Ex. B, ¶¶ 11-13, Ex. D, ¶¶ 9-10.

16. Inspector Hartman and Inspector Robert Edwards interviewed the German businessmen as well as REI's Moore, Reedy and Bray. Ex. B, ¶¶ 11-13, Ex. D, ¶ 10.

17. After conducting their interviews, Hartman and Edwards met with Attorneys William Hardy and Allen Carver of the United States Department of Justice Criminal Division. Hardy was a the Supervisor of the Fraud Section, and Carver a Public Integrity Section supervisor. Ex. B. ¶¶ 14-20, Ex. D, ¶ 11.

18. In their meetings with prosecutors, Inspectors Hartman and Edwards shared Deputy Postmaster General Stange's allegations about Voss and the OCR program and AEG's contact splitting allegations against Moore. The prosecutors indicated that there did not at that point appear to be direct evidence of a federal crime, but advised that the Inspection Service should continue to investigate. *Id.*

19. Mr. Hardy told the Inspectors that in his opinion the possibility of payment of illegal gratuities would be a "forthcoming" line of inquiry and that they should research financial statements and other evidence for possible payment of illegal gratuities. *Id.*

20. Hardy and Carver also encouraged the inspectors to follow up on the possibility that Moore and REI had committed, or were committing crimes. They raised the possibility REI had made a false official statement, see 18 U.S.C. § 1001, and suggested investigating REI's intention and capability of actually competing on the Phase II conversion program. The prosecutors told Hartman and Edwards to be alert for a pattern of irregular, possibly unethical, behavior, that the should examine postal contracting regulations for

sole source procurement and their relevance to the multiline OCR procurement issue and that they should have further discussions with Strange regarding her original allegations. *Id.*

21. Edwards and Hartman subsequently sent a memorandum to Chief Clausen advising him of their discussions with Hardy and Carver and the prosecutors' advice to continue investigating the OCR matter and Voss' and REI's respective roles. They advised the Chief Inspector that "the approach we would be taking [to the investigation] points towards a conspiracy, mail fraud and ethics violations," and that an investigation of this sort would require full time attention. The Chief Inspector approved, and eventually a task force was established to look into the Postal Service's conduct of OCR procurement. Ex. B ¶ 20; Ex. D ¶ 12 and Ex. 1 thereto.

22. The memorandum in general terms outlined the nature and scope of the investigation that followed. Ex. B, ¶¶ 20-22, Ex. D, ¶ 12.

23. Inspectors subsequently learned that by claiming excessive amounts on his travel vouchers Voss defrauded the government of over $44,000. A grand jury investigation commenced and subpoenas turned up checks from John Gnau to Voss. Ex. D,¶¶ 15-16

24. Postal Inspectors learned in their investigation that John Gnau operated a consulting firm known as Gnau & Associates Incorporated ("GAI"). Ex. B ¶ 4; Ex. K ¶ 7.

25. Postal Inspectors learned in their investigation that Gnau paid kickbacks of money received from REI to U.S. Postal Governor Peter Voss. Ex. B ¶5; Ex. K ¶ 4. Inspectors also learned that William Spartin

bribed Voss with airline tickets and that Voss helped Spartin receive executive recruiting contracts from the Postal Service, including a contract to search for a new Postmaster General to replace Paul N. Carlin. Ex. B ¶¶ 37, 56.

26. Postal Inspectors learned in their investigation that on or around Labor Day, 1984, REI vice president Reedy dined with Governor Voss. Ex. B ¶ 29; Ex. K ¶ 7.

27. Postal Inspectors learned in their investigation that at the dinner referred to above, Voss recommended to Reedy that REI hire Gnau and his firm as consultants. *Id.*

28. Inspectors learned in their investigation that Reedy informed Moore of the dinner with Voss and Voss' recommendation of Gnau. Ex. B ¶ 29 & Ex. 4 thereto.

29. Postal Inspectors subsequently concluded that Gnau was paying kickbacks to Voss. Ex. B ¶ 24; Ex. K ¶ 4.

30. On or around April 8, 1986. Reedy was questioned by Postal Inspectors regarding the circumstances under which REI had come to hire Gnau. Reedy said that he learned of Gnau from Bob John Robison during an inadvertent meeting at the Republican National Convention in 1984. Ex. B ¶ 32.

31. Postal Inspectors learned in their investigation that soon after his April 8, 1986 meeting with Inspectors, Reedy called William Spartin. Spartin Statement (Ex. M) at 28.

32. Postal Inspectors learned in their investigation that Reedy did not actually obtain Gnau's name from Robison but rather from Peter Voss. Ex. B ¶ 32.

33. Postal Inspectors concluded that Reedy lied in his April 8, 1986 interview when he stated that he obtained Gnau's name from Voss. Ex. B ¶ 32; Ex. K ¶ 9.

34. Postal Inspectors learned in their investigation that Reedy did not immediately hire Gnau, and that Voss called Moore regarding Voss' recommendation of a consultant to Reedy. Ex. B ¶ 29 & Ex. 4 thereto.

35. Postal Inspectors learned in their investigation that Moore raised Voss' referral of Gnau with Reedy and told Reedy not to "drop the ball." Ex. B ¶ 30 & Ex. 5 thereto.

36. Inspectors' review of telephone records obtained in the investigation led them to observe at least 20 telephone calls between REI's offices and Governor Voss' office between July, 1984 and December, 1984. Ex. B ¶ 31.

37. When interviewed by Inspectors, Voss' administrative assistant, Sharon Peterson estimated that between September, 1984 and December, 1984, Voss made five to ten follow-up telephone calls relating to REI's hiring of GAI. Ex. B ¶ 30.

38. Inspectors obtained in the investigation notes by Moore that appeared to be dated December 18, 1984 and included the following: "Get John Knau [sic] involved have broad scale association with John—get together." Ex. B ¶ 19 & Ex. 4 thereto.

39. Inspectors learned in their investigation that in early 1985, REI retained the consulting firm Gnau & Associates, Incorporated ("GAI"). Ex. B ¶ 31.

40. In reviewing telephone records, Inspectors noticed that after early January, 1985, there were no indications of further calls between REI's offices and Voss' office. *Id.*

41. During the investigation, Inspectors obtained notes authored by Moore that appeared to reflect Postal Service Board of Governors discussions under what appeared to be a heading "Closed Session." Inspectors concluded that the information recited in notes described in the foregoing paragraph appeared to reflect information from a closed session of the United States Postal Service Board of Governors. Ex. K ¶ 11.

42. Inspectors obtained during the investigation notes authored by Moore notes dated April 29, 1985 containing the following entry: "Consultant—wired (Peter Voss)." Ex. B ¶ 34 & Ex. 6 thereto.

43. In their investigation, Inspectors learned that in 1985 REI was attempting to obtain from the Postal Service a sole source contract for production of OCRs. Ex. B ¶ 34: Ex. K ¶ 10.

44. Michael Marcus told inspectors that Voss attempted to undermine PMG Carlin's decision to acquire multiline OCR technology by competitive procurement and that Voss pressed for the immediate acquisition of multi-line OCRs from REI. Inspectors also learned that around the same time Moore and REI mounted an intense media and lobbying campaign to reverse the Postal Service's OCR strategy and obtain a sole source contract. Ex. B. ¶ 8; Ex. D ¶ 7; Ex. E ¶¶ 5, 10; Ex. J at 14; Complt.,¶ 10.

45. Michael Marcus of GAI told Inspectors that during a meeting with Gnau and Moore and Reedy, either

Moore or Reedy remarked "[w]hy don't you get Peter Voss to order sole source.'" Ex. B ¶ 34; Ex. J at 15.

46. Marcus also told Inspectors that he received information from Voss and passed it on to REI's Reedy and Frank Bray and he would write, with assistance from Reedy and Bray, documents on OCR-related topics. Ex. J at 13-14.

47. Marcus also told Inspectors that the documents he authored were favorable to REI and that Voss passed Marcus' work product within the Postal Service as Voss' own work product. *Id.* at 14.

48. John Gnau told Postal Inspectors of a conversation in which Reedy asked him "what's your arrangement with Peter Voss" to which Gnau replied "[i]t's better you not know." Gnau also told Inspectors that on October 12, 1984, he met Reedy at the Admirals Club in the Dallas-Fort Worth airport. Gnau told Inspectors that Reedy said "Peter Voss said you can do great things. Peter and Bill have a friendship and we need help in getting a Postal Service contract." Gnau at 8. Gnau told Inspectors that he suggested to Reedy that they refer to Voss as "our friend" and Reedy said "I understand." Gnau Statement (Ex. O) at 8-9, 12. Gnau told Inspectors that on another occasion when discussing REI payments to Gnau's firm, Reedy said to Gnau "I know you have people to take care of." Gnau told the grand jury that he understood Reedy to refer to Voss. Ex. Q at 10-13.

49. REI employee Frank Bray told Inspectors that Moore devised a marketing strategy that was designed to allow REI to characterize the award of the Phase IIA contract to retrofit single line OCRs as a de facto sole source award and help create a climate favorable to

an immediate sole source award to REI for new multi-line machines. Bray Grand Jury Transcript (Ex. L) at 71.

50. Bray also told Inspectors that REI requested more technical information from AEG than REI needed to develop a retrofit kit for the Phase I single line OCRs. Ex. B ¶ 23.

51. Bray's information led the Inspection Service to doubt that REI had competed in the Phase IIA procurement in good faith.

52. When interviewed by Postal Inspectors on July 25, 1986, Moore stated that he was uncertain what role William Spartin was playing in GAI's efforts in representing REI to the Postal Service. Moore stated "[w]e kind of ignored him." Ex. B ¶ 41 & Exhibit 5 thereto at 11.

53. During their investigation, Postal Inspectors obtained a memorandum from Reedy to Moore dated April 8, 1985·

> Five weeks have elapsed since we presented "in camera" for the USPS Board of Governors in early March. Things continue to look as though we could get a significant order relatively soon. I don't have to tell you how fragile the situation is. I think you got some sense of this from talking to Spartin; however, I think the basic tactics are correct, the economics are on our side and we have chosen well, so let's see where it goes.

Ex. B ¶ 44 & Ex. 10 thereto; Ex. K ¶ 12.

54. Postal Insepctors learned during their investigation that William Spartin was the president of MSL International, an executive recruiting firm, and that in

late 1985 Spartin was given a contract to search for a candidate to replace Paul N. Carlin as Postmaster General of the United States. Inspectors also learned that Spartin was the president of GAI. Ex. B ¶¶ 4, 37-38; Ex. K ¶ 12.

55. Postal Inspectors learned in their investigation that Spartin called Moore and requested that Moore provide him names of candidates for the office of Postmaster General. Ex. B ¶¶ 39-41 & Ex. 5 thereto at 13-14.

56. Postal Inspectors learned in their investigation that Moore provided Spartin with three names, including Albert V. Casey. Ex. B ¶ 41 & Ex. 5 thereto at 14.

57. Postal Inspectors learned in their investigation that Moore also agreed to call Casey and see if Casey would take a call from Spartin and that Moore did call Casey. Ex. B ¶ 41 & Ex. 5 thereto at 14. Carlin's replacement by Dallas businessman Albert V. Casey caused speculation in the media and concern in Congress of corruption relating to REI's efforts to obtain an OCR contract. Ex. B ¶ 36 and exhibits 8 and 9 thereto.

58. Moore told Inspectors that he did not at first believe that Spartin was recruiting for a new postmaster general to replace Carlin. Ex. B ¶ 41 & Ex. 5 thereto at 13. Moore's explanations regarding the nature and extent of his contact with Spartin caused Inspectors to question Moore's candor. Ex. B ¶¶ 40-44; Ex. K ¶ 12.

59. William Spartin told Postal Inspectors that he and Moore agreed to say that Moore had called Spartin recommending candidates for Postmaster General. Ex. B ¶ 40.

60. Gnau told Postal Inspectors that about the time he received a grand jury subpoena, he received a phone call from Reedy. Gnua told Inspectors that he wanted to get together to discuss a couple of issues. Gnau told Inspectors that the meeting occurred at the Maison Blanche Restaurant in Washington, D.C. with Moore and Reedy and that the following was discussed: Gnau told Inspectors that Moore and Reedy said "[o]ur attorneys are nervous about this meeting, but we aren't trying to do anything wrong." Moore said he was nervous about Spartin's attempted cover up. Moore and Reedy wanted to know about the involvement of Gnau and Voss in any illegal activity that they should know about. Gnau told Inspectors that he responded "[i]t's better you not know." Ex. O at 21. Gnau also told Inspectors of a conversation with Moore in late May, 1986 on the White House lawn in which Moore stated that he was uncomfortable with the cover-up Moore and Spartin had agreed upon.

61. Michael Marcus told Inspectors that on March 28, 1986, Marcus was contacted by William Spartin. Marcus told Inspectors that Spartin said he (Spartin) had a meeting scheduled with Postal Inspectors. Marcus also told Inspectors that Spartin said that a full scale investigation was under way and described Marcus as the "loose cannon on deck." Marcus told Inspectors that Spartin also stated that Moore, Reedy, Gnau and Voss had already met and developed a story to cover up their involvement. Marcus told Inspectors that Moore, Reedy, Gnau and Voss had purged their files and that Spartin urged Marcus to meet with Gnau to develop their story. Ex. B ¶ 40; Ex. K ¶ 13; Ex. J at 22.

62. REI was not able to locate the following records: Moore's telephone log for the period October 19, 1984 to

January 15, 1985 (identified as Log No. 4); Telephone toll records for Moore for January, February, April, November and December 1984 and January 3 and 4, 1985; Reedy's telephone toll records for January-February, April-May and December, 1984 and January, March and April, 1985. Carol S. Lyons Grand Jury Transcript (Ex. Q) at 19-25: Ex. K ¶ 13; Ex. B ¶ 46.

63. REI turned over to the grand jury Moore's "Postal" Notebook. On its cover is the following: "80 Sheets 11˝ x 8 1/2˝ College Ruled." Inspectors reviewed the notebook and found it contained 44 sheets. Ex. B ¶ 47 and Ex. 1 thereto (Moore's "Postal" Notebook); Ex. K ¶ 13 Inspectors also found that it contained no dates for entries between January 6, 1986 and June 24, 1986. Ex. B ¶ 47.

64. Inspectors reviewed another of Moore's Moore's notebooks and found it contained an entry for January 27, 1987 as follows:

> "A lot of homework; drive a wedge between people"
>
> "(intimidate)",
>
> "Answer I don't know, I really can't remember",
>
> "Excitable".
>
> "All kinds of scenarios",
>
> "Ask same questions over and over",
>
> "Don't relax", "Long interrogation, tough questions at end)",
>
> "Possible subpoena".

Ex. B ¶ 48 & Ex. 11 thereto; Ex. K ¶ 14.

65. REI employees subsequently testified to the grand jury that Moore made comments to this effect in a staff meeting that day. Ex. B ¶ 49; Ex. K ¶ 14.

66. Prior to January 27, 1987, Inspector Hartman had made arrangements with REI's general counsel for Inspectors to interview REI employees in the week following January 27, 1987. *Id.*

67. REI competed in 1987 in a test of potential vendors' multiline OCR machines. Unisys Corporation teamed with REI after REI's October 1988 indictment submitted REI's machine and test results in an unsuccessful bid for a multiline OCR procurement contract. *Unisys Corp. v. United States Postal Service*, Civ. No. 89-331 LON (D. Del. 1989), Ex. S.

68. In rejecting Unisys' challenge to the contract award to ECA, the United States District Court for the District of Delaware concluded, among other things, that "[s]ince the REI machine performed so poorly in relation to the ECA machine in terms of total life cycle cost analysis, the record indicates that Unisys would have had to lower its original bid from $233.6 million to $3,805,585 in order to win the contract." *Id.* at 22.

69. Inspector Norman Robbins only role in respect of the investigation at issue in this case was to administer a polygraph examination to William Spartin. Robbins Decl. (Ex. X).

70. Inspector Robert Edwards worked on the investigation from mid-1985 to January 1987, and did not participate in any recommendation to prosecute Moore, Reedy or REI. Ex. D ¶¶ 3, 20.

71. Inspector Pierce McIntosh worked on the investigation from November 1985 to August 1987 and

did not participate in any recommendation to prosecute Moore, Reedy or REI. McIntosh Decl. (Ex. Y) ¶¶ 2-3.

72. Inspector Michael Hartman worked on the investigation from November, 1985 through the trial of Moore, Reedy and REI. Inspector Hartman had no personal or professional stake in what kind of OCRs the Postal Service purchased, who they purchased them from, or how any procurement of OCRs might be structured. Ex. B ¶¶ 3,7.

73. Inspector Frank W. Kormann worked on the investigation from December 1985 through the trial of Moore, Reedy and REI. Inspector Kormann had no personal or professional stake in what kind of OCRs the Postal Service purchased, who they purchased them from, or how any procurement of OCRs might be structured. Ex. K ¶¶ 3,5.

74. No one instructed or suggested to the Inspectors working on the investigation that Moore be prosecuted to retaliate for his criticism of the Postal Service. Ex. B ¶ 7; Ex. K ¶ 5; Ex. Y ¶ 10; Ex. D ¶ 13.

75. AUSA Joseph B. Valder made the decision to use summaries of witness statements before the Grand jury. AUSA Valder had used this procedure in past cases. Valder Decl. (Ex. C) ¶ 10.

76. Inspectors working on the investigation drafted the summaries based on their interviews with the witness. The draft was reviewed for accuracy with the witness and his or her attorney prior to presentation to the grand jury. *Id.*

77. Before the grand jury, the summary statement was used as follows: the witness whose testimony was presented in this manner was summoned before the grand jury; was present during the reading of the

summary to the grand jury; was asked read along; and was asked to vouch both that the summary was read correctly and that it was true and accurate. Mr.Valder asked any questions he had, and the grand jurors asked their questions. *Id.*

78. AUSA Valder provided excerpts of summary statements of certain witnesses and other material to Brian Gettings, an attorney representing William Spartin. Ex. C ¶ 13; Ex. B ¶ 64.

79. AUSA Valder provided the materials referred to in the foregoing paragraph at Mr. Gettings' request. Ex. C ¶ 13; Ex. B ¶ 64.

80. Mr. Gettings informed Mr. Valder that he needed the materials referred to above for the purpose of refreshing Mr. Spartin's recollection and assisting Mr. Spartin in fulfilling Mr. Spartin's obligations under his non-prosecution agreement with the United States. Ex. C ¶ 13; Ex. K ¶ 19.

81. AUSA Valder determined what materials would be provided to Mr. Gettings. Ex. C ¶ 13.

82. Postal Inspectors working on the OCR procurement investigation did not provide the excerpts of summary statements or other materials referred to in the foregoing paragraph to Mr. Gettings, or to Mr. Spartin. Ex. C ¶ 13; Ex. B ¶ 19.

83. Postal Inspectors working on the OCR procurement investigation did not provide transcripts of grand jury testimony to Mr. Gettings or to Mr. Spartin. Ex. C ¶ 13; Ex. B ¶ 19.

84. The meeting at which a copy of William Spartin's non-prosecution agreement was torn in half occurred in the United States Attorney's Office on October 24,

1986. Mr. Spartin was accompanied by his attorney, Brian Gettings.

85. The Postal Inspection Service administered a polygraph examination to William Spartin, which occurred on December 5, 1986. Ex. X ¶ 4.

86. The conclusion of the polygraph examination was that Spartin indicated no deception on the question of whether he told, or was present when anyone else told anyone at REI of the Voss payoffs. *Id.* ¶¶ 6, 8.

87. Inspectors Hartman and Kormann did not give former Postmaster General Paul Carlin a copy of a draft indictment to review. In late September, 1988, AUSA Valder asked Inspectors Hartman and Kormann to verify certain facts in a draft indictment that had been prepared. The Inspectors interviewed Mr. Carlin at his home on September 20, 1988. They had a copy of the draft indictment provided by Mr. Valder. They did not show it to Mr. Carlin. They did not identify the document to Mr. Carlin and they did not tell Mr. Carlin that it was a draft indictment. They did not tell Mr. Carlin that any indictment was being considered. The Inspectors interviewed Carlin, verified the accuracy of the factual matters in question and, departed. Ex. B ¶ 67; Ex. K ¶ 22.

87. In December, 1987, Inspector McIntosh received a phone call from former Postmaster General Carlin inquiring about the results of Inspectors' inquiry relating to a memorandum and a copy thereof authored by Deputy Postmaster General Strange. Ex. Y ¶ 8.

88. Carlin had been interviewed in this inquiry as had Ms. Strange, Albert Casey and John McKean. An Inspection Service laboratory analysis also was ob-

tained in an effort to determine if the memorandum and copy thereof were prepared contemporaneously. *Id.*

89. Inspector McIntosh informed Carlin of the Inspection Service's conclusion that there was no evidence that the memorandum and copy had not been prepared contemporaneously. *Id.* ¶¶ 8-9.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 92-2288 (NHJ)(AK)
[consolidated with Civ. No. 93-0324 (NHJ) (AK)]

WILLIAM G. MOORE, JR., ET AL., PLAINTIFFS

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

DECLARATION OF MICHAEL HARTMAN

Pursuant to 28 U.S.C. § 1746, I Michael Hartman hereby make the following unsworn declaration in support of the United States Postal Inspector Defendants' Motion for Summary Judgment.

1. I have personal knowledge of the following facts and if called as a witness could competently testify thereto.

2. I am employed by the United States Postal Inspection Service as a Postal Inspector. I have been continuously so employed since February, 1979. The Postal Inspection Service is responsible for safeguarding the integrity of the United States mails and the integrity of United States Postal Service systems, operations and property.

3. In November, 1985, I was assigned to an investigation relating to alleged irregularities with the Postal Service's efforts to procure automated mail processing equipment, in particular optical character reader (OCR) equipment.

4. The investigation into irregularities in OCR procurement led to guilty pleas and convictions of several persons. Most prominent among those to plead guilty was United States Postal Governor Peter E. Voss. In addition to Governor Voss, John Gnau and Michael Marcus also pled guilty to federal crimes. Mr. Gnau and Mr. Marcus were employed as consultants by Recognition Equipment, Incorporated ("REI") in an effort to obtain contracts for the production of multiline optical character reader ("OCR") machines. Depending upon how the Postal Service might structure its procurement, the contracts that REI sought were worth between $250,000,000 to $400,000,000. In addition to Mr. Gnau and Mr. Marcus, William Spartin was the president of Mr. Gnau's consulting firm, Gnau and Associates, Incorporated, "GAI". In April, 1986, Mr. Spartin entered into a non-prosecution agreement with the United States Attorney in which he agreed to provide truthful and complete information and testimony for the government.

5. Our investigation revealed that Mr. Gnau paid Mr. Voss kickbacks in exchange for Mr. Voss' efforts to help win OCR production contracts for REI. We learned that in addition to advocating actions that would aid REI, Governor Voss applied pressure to Postal Service management in effort to have them take steps favorable to REI. Voss also leaked internal confidential Postal Service information to GAI's Michael Marcus. Marcus told us that he used this information to provide memoranda, position papers and other written materials for Voss to use within the Postal Service to build support for actions favorable to REI. Marcus told us that on several occasions, Voss passed Marcus' work off within the Postal Service as Voss' own work pro-

duct. Marcus also told us that REI vice president Robert Reedy and REI employee Frank Bray helped prepare some of these memoranda and position papers using internal and confidential Postal Service information leaked by Voss. Marcus also told us that he provided information leaked by Voss to REI. A review of Moore's Postal Notebook showed what appeared to be his notes regarding a closed meeting of the Board of Governors. A true and complete copy of Moore's Postal Notebook as received by us during the investigation is attached hereto as Exhibit 1.

6. As the result of our further investigation of these contents, I concluded, as did other Postal Inspectors who participated in the investigation, that Moore and REI vice president Robert Reedy knew about the Voss-Gnau kickback scheme and also participated in a scheme to corruptly influence Postal Service personnel decisions. Because Moore, Reedy and REI came to know of the scheme and continued to use the Gnau firm with such knowledge, I concluded that they joined in a conspiracy to defraud the United States.

7. The actions I took in relation to the investigation of the OCR procurement were taken solely in an effort to uncover the full extent of the criminal conspiracy and to bring to justice those, including Moore, Reedy and REI, whom I and other Inspectors believed knowingly participated in the conspiracy. At no time did I take any action for the purpose of punishing or retaliating against Moore, Reedy or REI for any criticism of Postal Service procurement decisions. At no time did anyone, from the Inspection Service or anywhere else in the Postal Service, suggest to me that Mr. Moore should be prosecuted for his criticism of the Postal Service. I had no personal or professional stake in what kind of OCRs

the Postal Service purchased, who they purchased them from, or how any procurement of OCRs might be structured. I was interested in OCR procurement only to understand how the conspiracy we uncovered operated and how it might have corrupted the decision making process. Everything I did in relation to Mr. Moore and his company I did based on my understanding and analysis of the evidence we obtained and in a good faith effort to uncover the full extent of the criminal activity.

8. As the result of my work on the investigation, I learned that in July 1985, Deputy Postmaster General Jackie A. Strange approached the Chief Postal Inspector and alleged that she believed that Governor Peter E. Voss was acting improperly with respect to the Postal Service's procurement of OCR equipment. I learned that Ms. Strange had told the Chief Inspector of her belief that Governor Voss was exerting unusual and unwarranted pressure on her and other Postal Service officials with respect to OCR procurement. I also learned that Ms. Strange told the Chief Inspector that, although she had no proof, she tended to suspect that Voss had some personal interest in the OCR procurement. I understood these facts to be a basis on which the Inspection Service had first come to focus on OCR procurement as a potential subject for criminal investigation.

9. Sometime in the Fall, 1985, I became aware of an allegation of attempted contract splitting made against REI president William G. Moore, Jr. I also learned that the Postal Service had decided in approximately July, 1985 to acquire multi-line OCR machines as part of its program to automate mail sorting. I learned that prior to deciding to acquire multi-line OCR machines, the Postal Service had procured, and was taking steps to

deploy, single-line OCR machines (in a procurement referred to as "Phase II"). I also learned that as a result of a management decision referred to as the "mid-course correction" Phase II machines were to be retrofitted to multiline capability (a procurement referred to as "Phase IIA"). I also learned that the Postal Service was undertaking a procurement for original equipment multiline systems, a procurement referred to as "Phase III."

10. The contract splitting allegation against Moore related to the procurement of Phase IIA retrofit kits for the single line OCR machines. I learned that the single line machines that were to be retrofitted were sold by Electrocom Automation ("ECA") of Arlington, Texas and employed technology licenced to ECA by AEG Telefunken, a West German concern. I also learned that both ECA and Recognition Equipment, Incorporated were competing to retrofit the ECA single line machine to multiline capability. I learned that a dispute had arisen between AEG and REI regarding the sharing of technical information that REI claimed to need in order to retrofit the ECA single line machine to multiline capability. I further learned that on October 17, 1985, representatives of AEG and REI had met to discuss the dispute and that the contract splitting allegation had arisen from this meeting.

11. When interviewed by Inspector Robert Edwards and me on November 7, 1985 about the contract splitting allegations, Dr. E. Leopold Dieck of Telefunken said that during the October 17, 1985 REI-AEG meeting, Moore made various statements that Dieck said clearly indicated to him Moore's desire that AEG and REI split the multiline OCR procurement so that ECA (AEG's licensee) would receive the Phase IIA

contract to retrofit the ECA single line machine and REI would receive a contract to produce new original equipment multiline machines in the "Phase III" procurement. Dr. Diech also said that Moore referred to his (Moore's) political influence and that he could get the retrofit procurement killed if AEG did not go along. Dr. Diech also stated that Moore said that "he [Moore] spent $70 million on the USPS and never got a contract, but I'll be damned of I don't get this one." Dr. Diech said that he was sufficiently upset by Moore's comments that he reported them to the West German embassy.

12. On November 6 , 1985, Inspector Edwards and I also interviewed Dr. Kurt Scheidhauer of AEG regarding the contract splitting allegation against Moore and REI and the October 17, 1985 meeting between Diech and Scheidhauer of AEG and Moore, Reedy and Bray of REI. Dr. Scheidhauer was interviewed in part because of an exchange of correspondence between REI and AEG. AEG alleged in this correspondence that it was willing to provide the technical support REI needed, but that REI was not really interested in competing on the conversion program, and was attempting to discredit the Postal Service's intention of creating a competitive environment for both its Phase IIA and Phase III multiline programs. Scheidhauer's letter on behalf of AEG further stated that AEG's impressions were "straightened by Mr. Moore's ideas about splitting the multi line procurement between Electrocom (for the Conversion Program) and REI (for the Phase III Program)." Dr. Scheidhauer gave an account of the AEG-REI meeting similar to that provided by Dr. Diech.

13. On November 20 1985, Inspector Robert Edwards and I also interviewed REI's Moore, Reedy and

Bray regarding AEG's contract splitting allegation. Moore denied the allegation and stated in essence that he was merely relating to the AEG officials what he (Moore) would do about OCR procurement if he were postmaster general. Moore indicated that he made his comments in response to a question from the AEG officials. Near the end of the interview, I asked Moore, Reedy and Bray if any of them had met or spoken, individually with a member of the Board of Governors. At the time, I asked this question because of the allegations that had been made by Deputy Postmaster General Strange with respect to Mr. Voss' behavior. We did not know at that time that Voss was accepting kickbacks from REI's consultant working on the OCR procurement. Reedy answered my question by saying no. Moore and Bray non-verbally indicated agreement with Reedy's response.

14. After conducting our interviews regarding the contract splitting allegation, Inspector Edwards and I had meetings in November, 1985 with Attorneys William Hardy and Allen Carver of the United States Department of Justice ("DOJ") Criminal Division. At that time, Mr. Hardy was the supervisor of the Fraud Section. Mr. Carver was a supervisor in the Public Integrity Section. Mr. Hardy met with us for over two hours. In our meetings, we shared with Mr. Hardy and Mr. Carver Deputy Postmaster General Strange's allegation about Voss and the MLOCR program. Both Mr. Hardy and Mr. Carver were positive and supportive regarding our investigative efforts. Neither Mr. Hardy nor Mr. Carver felt that there was direct evidence of a federal crime, but both advised us to continue our inquiry and low key gathering of information.

15. In our meeting, Mr. Hardy stated that in his opinion the possibility of payment of illegal gratuities would be a "forthcoming" line of inquiry and he advised that we should research financial statements and other evidence for possible payment of illegal gratuities. Mr. Carver advised that we should obtain and review financial statements and other data from the Office of Government Ethics or other appropriate source.

16. Mr. Hardy and Mr. Carver also advised that we should investigate the possibility of a false official statement in violation of 18 U.S.C. § 1001 by investigating REI's intention and capability of actually competing on the Phase IIA conversion program.

17. Mr. Hardy and Mr. Carver also advised that we should review and analyze comments, meetings, testimony, transcripts and other information to detect and establish a pattern of irregular, possibly unethical behavior and possible perjury regarding an Executive Order potentially relevant to the inquiry.

18. Mr. Hardy and Mr. Carver also advised us to examine postal contracting regulations for sole source procurement and their relevance to the multiline OCR procurement issue.

19. Mr. Hardy also advised us, in light of Jackie Strange's later comments retracting her allegations of possible personal interest on Voss' part, to have another discussion with her regarding the events prior to her testimony before any grand jury.

20. Immediately following our meeting with Mr. Hardy and Mr. Carver, Inspector Edwards drafted and we both reviewed and signed, a memorandum to the Chief Inspector advising him of our discussions with DOJ's Fraud and Public Integrity Sections and the

advice they had given us. Based on our discussions with Mr. Hardy and Mr. Carver, we advised the Chief Inspector that "the approach we would be taking [to the investigation] points toward a conspiracy, mail fraud and ethics violations." We advised the Chief Inspector that based on our discussions with Hardy and Carver we should try to develop further evidence and that the matter appeared to require our full time attention. We also outlined other investigative steps to pursue. I have reviewed a copy of the memorandum we prepared for the Chief Inspector, and it truthfully and accurately reports our conversations with Mr. Hardy and Mr. Carver.

21. In our memorandum to the Chief Inspector, Inspector Edwards and I also outlined steps that we believed collectively would allow us to develop any potential case. Those steps included: going to Chicago to review Phase II OCR acceptance tests and to view the REI OCR machine then operating in the Chicago Post Office; creating a complete chronological document file on the OCR issue; creating a complete subject file on the OCR issue, including Congressional testimony, REI correspondence and other potentially relevant documents; and preparing a narrative brief of the salient points. Our interest in these matters at this early stage and throughout our investigation related solely to the need to investigate possible corruption in the Postal Service's procurement process and to ascertain the motives of those involved in the procurement issues under investigation. Our purpose was not to retaliate for anyone's First Amendment-protected activity

22. Inspector Edwards' and my meeting with Mr. Hardy and Mr. Carver occurred soon after I had been

assigned to the investigation. The plan of action we developed in light of Mr. Hardy's and Mr. Carver's comments set in a very broad way the direction of our investigation. Consistent with Mr. Hardy's and Mr. Carver's suggestions, we looked for the possibility that someone at the Postal Service was being paid illegal gratuities. Also consistent with Mr. Hardy's and Mr. Carver's suggestions, we considered the possibility that REI was not competing in good faith in the Phase IIA OCR conversion procurement and might be illegally trying to undermine that procurement. That is why we began to investigate Moore and REI. We did not begin to investigate Moore and REI out of any hostility to Moore's public speech. By the time I became involved in the investigation the issue of whether to procure single line or multiline OCR equipment had been settled by Postmaster General Carlin in favor of multiline acquisition. My sole concern was to determine the full extent to which the decision making process had been corrupted.

23. Mr. Hardy's prediction that gratuities would be "'forthcoming" was correct. We eventually learned that Governor Voss was accepting illegal gratuities from John Gnau of Gnau and Associates, Incorporated ("GAI"), a consulting firm hired by REI to lobby the Postal Service in an effort to sell the REI multiline OCR machine. We also learned that GAI president William Spartin was bribing Governor Voss with airline tickets. In exchange for Voss' ordering and billing of travel tickets to an account Spartin controlled, Voss helped steer Postal Service executive recruiting contracts to Spartin's executive recruiting firm MSL International. We also learned from REI employee Frank Bray that REI President William Moore had devised a

"marketing strategy" that was designed to undercut the competitive procurement of retrofit kits ("Phase IIA") and create a political climate conducive to REI's receiving a sole source contract for a complement of original equipment multiline OCR machines. In particular, Mr. Bray acknowledged that, at Mr. Moore's direction, REI had demanded more in the way of technical information from AEG than REI needed for the purpose of developing a retrofit kit. In my view, this later confirmation by Bray (who cooperated under an immunity agreement) tended to support the original AEG allegation against Moore. In light of our original conversations with Mr. Hardy and Mr. Carver, these developments, along with other evidence uncovered in the investigation, contributed to my overall sense that our investigation was necessary, justified, and on the right track.

24. We learned that Gnau paid Voss a kickback of money Gnau received from REI under his consulting contract with REI. In addition, Gnau, Voss, Marcus and Spartin agreed to split the proceeds of the one percent contingent fee REI had agreed to pay GAI in the event REI won an OCR production contract. We learned that the total value of potential OCR production contracts was between $250 and $400 million, meaning that Gnau, Voss, Spartin and Marcus would split somewhere between $2.5 and $4 million. As a result of the investigation, Voss pled guilty to federal crimes on May 30, 1986.

25. Although our successful apprehension of Voss, Gnau and Marcus was a major accomplishment for the Inspection Service and those of us who worked on the investigation, it was necessary for us to continue the investigation in order to determine who else, both in

the Postal Service and outside, might have been involved in the scheme by which the Postal Service's decision making regarding automation and OCR procurement had been corrupted. Eventually, we concluded that Moore, Reedy and REI acquired sufficient knowledge of their consultants' actions as to be culpable as members of the conspiracy.

26. The investigation that began in mid-1985 and culminated in the indictment of Moore, Reedy and REI in October, 1988 involved hundreds of interviews, thousands of documents and the sifting and analysis of a huge amount of evidence. It is not possible in this context to outline all of the evidence that I felt supported our conclusion that Moore, Reedy and REI knowingly participated in the conspiracy to defraud. I will describe briefly some of the most significant evidence that led me to believe that Moore, Reedy and REI knowingly participated in the conspiracy that we had uncovered.

27. We learned in our investigation that REI had competed in the earlier Phase II single line OCR procurement, but lost to Electrocom. We learned that the Postal Service had announced Electrocom as the winner of the Phase II procurement in July, 1984. We also learned that because the Postal Service planned to procure single line OCRs (designed to read the last line of an address) in Phase II and to encourage large volume mailers to affix the nine digit zip code to individual mail pieces, the Postal Service planned not to revisit the question of whether to procure multiline OCRs (designed to read all three lines of an address), until 1987. Therefore, it appeared that REI had no immediate prospects of receiving significant Postal Service business. According to Moore's notes, REI

planned in light of its failure to secure the Phase II contract, be getting out of the postal business. A true copy of Moore's notes received by us in the Investigation is attached hereto as Exhibit 2.

28. We learned that Governor Voss appeared to encourage Moore and REI about the prospects of USPS business. We learned from Voss' administrative assistant, Sharon Peterson, of a phone conversation in which Moore and Voss discussed Postal procurement. Ms. Peterson identified on a letter written by Moore her notes of the conversation between Moore and Voss which reflected statements such as "Making sure each governor has the letter in their hands;" "Already made moves to slow down;" "making point;" "taking heat;" "working for you." A true copy of Moore's letter to Voss bearing these notations and received by us in the investigation is attached hereto as Exhibit 3.

29. We also learned that on or around Labor Day, 1984, REI vice president Robert Reedy dined with Voss. During the dinner, Voss recommended that REI (who then was represented in Washington, D.C. by the well known consulting firm Hill & Knowlton) hire a new consultant, John Gnau of West Bloomfield Hills, Michigan. We learned that Voss followed up this recommendation with several phone calls urging that REI hire Gnau and GAI. Moore's notes, apparently of a telephone conversation with Voss on December 18, 1984, reflected the following: "Get John Knau [sic] involved have broad scale association with John—get together." A true copy of Moore's notes containing this entry and received by us in the investigation is attached hereto as Exhibit 4.

30. Ms. Peterson estimated that between September, 1984 and December, 1984, Voss made five to ten

follow-up telephone calls relating to REI's hiring of GAI. I thought that Voss displayed an unusual level of interest for a Governor to take in whether a potential vendor hires a particular consultant. I also felt that it should have at least raised suspicion on the part of Moore, Reedy and REI as to Voss' motives in recommending Gnau. We also learned that when Reedy did not immediately act on Voss' recommendation of Gnau, Voss called Moore and told him that he had put Reedy in touch with a consultant but that nothing had happened. Moore acknowledged in an interview with Inspectors that he then raised the issue with Reedy and told him not to "drop the ball." A true copy of our Memorandum of Interview of Mr. Moore and accurately reflecting his statements during the interview is attached as Exhibit 5 hereto.

31. I also noticed when analyzing telephone activity among subjects of the investigation, at least 20 telephone calls between REI and Governor Voss' office between July, 1984 and December, 1984. After REI retained Gnau and GAI in early 1985, however, there was no evidence of further telephone contact between Governor Voss and anyone at REI. There were, however, virtually hundreds of calls between Reedy and the three main players in the GAI consulting firm, Gnau, Marcus and Spartin. That the telephone contact between REI and Voss suddenly ended right around the time REI acted on Voss' recommendation to hire GAI appeared to me to be strange and not a coincidence. If Moore, Reedy and REI viewed Voss as an "independent" Board of Governors ally on the OCR question, as Moore, Reedy, and REI later would claim, it made no sense that REI, Moore or Reedy never again made direct contact with that "independent" ally. The

evidence regarding telephone activity, along with other evidence, led me to conclude that Moore, Reedy and REI became aware that once they had hired Gnau and GAI such direct contact with Voss no longer was necessary or advisable.

32. Other evidence also led us to believe that Moore, Reedy and REI understood their new consultants' true relationship with Voss. I learned that in an interview on April 8, 1986, Reedy lied to Inspector Edwards about Voss' referring him to Gnau. Reedy falsely told Inspector Edwards that he was introduced to Gnau at the 1984 Republican National Convention by Bob John Robison of Hill & Knowlton. In fact, Reedy obtained Gnau's name from Voss during their Labor Day, 1984 dinner. Reedy was forced to admit in a second interview, conducted on July, 25, 1986, that he lied to Inspector Edwards during the April 8, 1986 interview. Because in April, 1986 the Inspection Service was still investigating Voss' illegal activities, it would have been very helpful to have a truthful account from Mr. Reedy of how REI came to hire Gnau. In my experience as a fraud investigator, the reason people lie about key events in a transaction under investigation is that they have done something wrong and fear being caught. I could think of no other logical explanation why Reedy would lie to us about such an important fact. Reedy's lie was in my mind a significant fact indicating knowledge of the illegal action of Voss, Gnau, Marcus, and Spartin on REI's behalf.

33. When we learned that Reedy had lied to us about Voss' referral of Gnau, I concluded that Reedy also probably lied to Inspector Edwards and me when in our November, 20, 1985 interview of Moore, Reedy and Bray, I asked if any of the three had met with or

spoken individually with a member of the Board of Governors and all three had indicated not. I also came to believe that Moore and Reedy were less than candid with us by not volunteering their extensive telephone contact with Governor Voss in 1984 and the level of interest Governor Voss showed in whether REI acted on his suggestion of hiring Gnau, I also concluded that Frank Bray was less than candid when he was interviewed in April, 1986. In response to the question of how REI came to hire Gnau, Bray answered in essence "through Reedy." Bray later acknowledged to us that Reedy had told him about Reedy's Labor Day, 1984 dinner with Voss and that Reedy did so prior to the beginning of our investigation. Bray also acknowledged that he had altered his travel records to disguise his contacts with William Spartin. Although Bray stated that he subsequently changed his records again to make them accurate, Bray's actions were another factor that made me doubt the honesty and integrity of REI management in its dealings with the Postal Service and with our investigation.

34. Other evidence indicated that Moore, Reedy and REI understood the illegal nature of Voss and Gnau's relationship regarding OCR procurement. GAI's Michael Marcus told us that on one occasion either Moore or Reedy remarked to Gnau and Marcus "[w]hy don't you get Peter Voss to order sole source?" Moore's notes contained an entry, dated April 29, 1985, that read: "'Consultant—wired (Peter Voss)." A true copy of Moore's April 29, 1985 notes are attached as Exhibit 6. Gnau reported to us conversations with Reedy in which Reedy asked in substance "what is your arrangement with Voss" and Gnau replied that "it was better" that Reedy not know. I viewed both Reedy's question,

including its premise that there was "an arrangement" between Gnau and Voss and Gnau's answer as yet further proof that combined with all the other evidence indicated that Moore, Reedy and REI knew of the kickback arrangement. Gnau stated that on another occasion (in August, 1985) he negotiated a public relations contract with REI. In the course of the discussions over how much REI would pay GAI, Reedy said to Gnau in substance "I know you have people to take care of." Gnau stated to us that it was his impression that Reedy was referring to Voss. Gnau also told us that he instructed Reedy not to refer to Voss by name and instead to refer to Voss simply as "our friend" to which Reedy responded, according to Gnau, "I understand." Gnau also related to us that prior to a meeting with Postal Governors, including Voss, Gnau had informed Reedy that the other Governors did not need to know that Gnau and Voss knew each other.

35. We learned that in July, 1985, Postmaster General ("PMG") Paul Carlin had announced that the Postal Service would immediately implement the "mid-course" correction and begin to acquire multiline OCR read capability. Carlin later would tell us that he made this decision under pressure from the Board of Governors and that much of the pressure came from Governor Voss.

36. We learned that Postmaster General Carlin insisted that multiline read capability be acquired through competitive testing and procurement. We also learned that respected objective observers, including Comptroller General William Bowsher, endorsed Carlin's insistence upon competitive procurement of multiline acquisition. GAI's Michael Marcus reported to us that Voss and REI were dissatisfied with competitive

procurement and wanted a sole source contract for REI. Governor Voss pressured Deputy Postmaster General Strange to authorize such a sole source contract. Marcus reported to us that discussions began among he, Gnau, Spartin, and REI officials about finding a way to replace Carlin, using Voss' and Spartin's influence within the Postal Service. One of Moore's "80/20" time management worksheets for October, 1985 and received by us in the investigation had under the heading "Problems" a notation in Moore's handwriting that read "Paul Carlin." A true copy of that document is attached hereto as Exhibit 7.

37. On January 6, 1986, Carlin was replaced by Albert V. Casey. Carlin had been PMG only one year, and there was speculation in the media and concern among Members of Congress that Carlin's termination was related to REI's efforts to obtain an OCR production contract. I and other Inspectors were aware of such reports and viewed the allegations as worthy of investigation. Attached as Exhibit 8 hereto is a true copy of a newspaper article, "*Casey's postal appointment spurs interest in REI stock*," Dallas Times Herald, Thursday, Jan. 9, 1986, we received during the investigation. Also attached as Exhibit 9 hereto is a transcript, DECISION OF THE BOARD OF GOVERNORS TO REPLACE POSTMASTER GENERAL, JOINT HEARING BEFORE THE SUBCOMMITTEE ON POSTAL OPERATIONS AND SERVICES AND THE SUBCOMMITTEE ON POSTAL PERSONNEL AND MODERNIZATION OF THE COMMITTEE ON POST OFFICE AND CIVIL SERVICE OF THE HOUSE OF REPRESENTATIVES, 99th Congress, Second Session, February 5, 1986, which we received during the investigation.

38. We learned that with Voss' assistance William Spartin had received several executive recruiting contracts from the Postal Service. We also learned that William Spartin, the president of GAI, had an apparent conflict of interest in that he was awarded the contract to search for Carlin's replacement. Spartin told us that he decided that he would conceal his role in GAI from the Postal Service in order to continue to receive executive recruiting work from the Postal Service. He also acknowledged later attempting to cover up his GAI affiliation with a backdated letter of resignation from GAI.

39. We learned that Spartin obtained Albert Casey's name by calling Moore and that Moore agreed to make an introductory phone call to Casey on Spartin's behalf

40. Spartin later told us that after our investigation began, Moore agreed to a false cover story to the effect that Moore had called Spartin with PMG candidates, rather than Spartin calling Moore. John Gnau also told us of conversations with Moore in which Moore had said that he was uncomfortable with the cover story that he and Spartin had agreed upon. Michael Marcus also told us that he had a conversation with Spartin in which Spartin told Marcus that Gnau, Spartin, Moore and Reedy all had talked and agreed on a cover story. Marcus also told us that Spartin said that Gnau, Spartin, Moore and Reedy had purged their files and that Spartin recommended that Marcus do the same.

41. On July 26, 1985, we interviewed Moore regarding the events under investigation. Moore described Gnau as a "worker bee, not a name dropping type of guy." He told us that Spartin was a name dropper, and that he (Moore) was unsure of the role Spartin played. Moore stated to us, "[w]e kind of ignored him." Moore

stated to us that when contacted about the PMG search he doubted at first whether Spartin was really conducting a search for a new Postmaster General. Moore explained that he did talk to Spartin and gave Spartin three names of PMG candidates. We were not satisfied with Moore's explanation. Moore's conduct in making an introductory telephone call to Albert Casey, a very prominent and well known business executive, whom Moore regarded very highly was not consistent with Moore's claim to doubt that Spartin was recruiting a new PMG. We did not understand why, if Moore really did not believe Spartin, Moore would bother someone as prominent as Mr. Casey with the matter. A true copy of our Memorandum of Interview that accurately sets forth Moore's statements in the interview is attached hereto as Exhibit 5.

42. We also had interviewed Moore's administrative assistant and secretaries regarding his office routine and how telephone calls were handled. Moore's staff indicated that important calls generally would be put through to him, but that for all other calls a message would be taken. We learned that around 4:00 each afternoon, Moore and his administrative assistant reviewed the day's calls and that Moore decided which calls he would return and which he would refer to other REI officers. The fact that Moore took Spartin's calls did not square with his statements downplaying his contact with Spartin.

43. Moore's claim of uncertainty as to Spartin's role and that "[w]e kind of ignored him" also was undercut by the number of telephone calls we learned of between Reedy and Spartin. My analysis of telephone records indicated 20 or more calls from Reedy to Spartin between January, 1986 and March, 1986. We learned that

soon after being interviewed by Postal Inspectors on April 8, 1986, the interview in which Reedy lied about the Voss referral, Reedy called Spartin.

44. Moore claim that REI ignored Spartin was undercut by a memorandum from Reedy to Moore dated April 8, 1985, in which Reedy wrote:

> Five weeks have elapsed since we presented "in camera" for the USPS Board of Governors in early March. Things continue to look as though we could get a significant order relatively soon. I don't have to tell you how fragile the situations is. I think you get some sense of this from talking to Spartin; however, I think the basic tactics are correct, the economics are on our side and we have chosen well, so let's see where it goes.

A true copy of this memorandum, which we received during the investigation, is attached as Exhibit 10 hereto.

45. In light of the evidence described above, we concluded that Moore and Reedy were not candid regarding their extent of dealing with Spartin.

46. The reports of coverup and file purges we received from Gnau, Marcus and Spartin appeared to be corroborated by REI's claim that it could not locate certain documents subpoenaed by the grand jury. Moore's telephone log for the period October 19, 1984 to January 15, 1985 (identified as Log No. 4) was never turned over to the grand jury. Telephone toll records for Moore for January, February, April, November and December 1984 and January 3 and 4, 1985 never were turned over to the grand jury. Reedy's telephone toll records for January-February, April-May and December, 1984 and January, March and April, 1985 never

were turned over. The Fall of 1984 was in our view a critical period during which Voss followed up Moore and Reedy, regarding his recommendation of Gnau and Reedy discussed the proposed consulting relationship with Gnau. The early months of 1985 also were a critical period because the REI-GAI consulting relationship began in early January, 1985, when Voss arranged for Gnau and Marcus to meet with the new Postmaster General, Paul Carlin. The absence of toll records for these periods and the absence of Moore's phone log (that would reflect messages taken by his staff) prevented us from analyzing these records and shedding further light on the activities of Moore, Reedy, Voss and Gnau during these times. We viewed REI's inability to locate these records as suspicious in light of the accounts of cover stories and file purges we heard from Gnau, Marcus and Spartin.

47. We learned that Moore maintained a spiral bound "Postal" Notebook. According to its pre-printed cover, the notebook should have contained 80 pages. During our July 26, 1986 interview of Moore, he referred to what he claimed was a copy of his Postal notebook. At the time, the original had not been provided to the grand jury. When the original later was produced to the grand jury, it contained only 44 pages. The other 36 pages were not accounted for. In addition, there appeared to be no entries between January and June, 1986. That appeared strange given the public outcry over Carlin's firing and Casey's hiring and the fact that, after Casey's appointment, REI and GAI were discussing whether and how to approach the Postal Service about OCR procurement. A true and complete copy of Moore's Postal Notebook as received

by us during the investigation is attached hereto as Exhibit 1.

48. In addition to the statements of Gnau, Marcus and Spartin, and the missing REI records and notebook pages, one of Moore's notebooks contained the following entry:

> "A lot of homework; drive a wedge between people"
>
> "(intimidate)",
>
> "Answer I don't know, I really can't remember",
>
> "Excitable".
>
> "All kinds of scenarios",
>
> "Ask same questions over and over",
>
> "Don't relax" "Long interrogation, tough questions at end)",
>
> "Possible subpoena".

A true copy of Moore's notes received by us in the investigation is attached hereto as Exhibit 11.

49. The above entry appeared suspicious. REI employees confirmed to the grand jury that these notes reflected Moore's comments at a staff meeting held on January 27, 1987. A true copy of this notebook page as received by the grand jury is attached hereto. By January 27, 1987, I already had made arrangements with REI's General Counsel, Thomas Loose, for Inspectors to visit REI the very next week for the purpose of interviewing REI staff. Moore's notes appeared to me to indicate that he was coaching his staff as to how they should approach the interviews with Inspectors. Of particular concern to me was Moore's apparent

instruction to his staff to "[a]nswer I don't know, I really can't remember."

50. I recommended to the United States Attorney the prosecution of Moore, Reedy and REI based on the evidence and my belief that it was sufficient to indict, prosecute and convict. I did not act out of any ulterior motive to punish Moore, Reedy or REI for criticizing the Postal Service's procurement decisions. To me, the issue was not criticism of the Postal Service, but the use of illicit influence through Gnau, Marcus, Spartin and Voss to corrupt the decision making of the Postal Service and thereby defraud the United States.

51. During the investigation, we reviewed the public statements of Moore, REI and others on the issues of OCR procurement. This was generally consistent with the advice given by attorneys Hardy and Carver of the Department of Justice and is good investigative practice. Public statements such as these provide evidence of the motives and intent of those involved in the events at issue. In attempting to persuade the United States Attorney not to indict them, Moore, Reedy and REI argued that obtaining an OCR production contract was not crucial to REI's corporate fortunes. The intensity with which Moore and REI lobbied the Postal Service Board of Governors and the Congress appeared to contradict that position. We also examined REI's contact with other public officials, including members of Congress, in order to ascertain whether any other public officials had been corrupted, as Voss was, by REI's relationship with Gnau and GAI.

52. I am the author of the document "Arguments for Indicting the Corporation." I have reviewed the document, a true copy of which is attached hereto as Exhibit 12. Although I do not now recall specifically the cir-

cumstances under which I prepared it, the apparent purpose of the document was to briefly set forth reasons why it might be appropriate to indict Recognition Equipment, Incorporated. The document sets forth certain "givens," a "conclusion" and several points that are set forth as the "basis" for the conclusion. The document's conclusion is that "[t]his is a case of an underlying corrupt corporate management strategy to obtain USPS business rather than the isolated and independent overzealous action of two corporate officers." Each of the paragraphs following the conclusion are the "basis" for the conclusion and serve to tie the corporate entity to the multiline OCR sales effort conducted by Moore and Reedy. The points that are the basis for the conclusion refer to actions of Moore and Reedy as well as actions of others, such as REI's general counsel and chief financial officer.

53. The statement that " [i]ndependent of Voss/GAI actions, the corporation and its PAC funded a media and political campaign to discredit USPS management and cause financial harm to USPS" and the examples that follow that statement were included to help demonstrate that the REI case was "a case of an underlying corrupt corporate management strategy to obtain USPS business rather than the isolated and independent overzealous actions of two corporate officers." I did not include such a statement to suggest to anyone that Moore should be prosecuted because he lobbied Congress or spoke in the media, and I would not expect the United States Attorney to be persuaded to indict by such a suggestion. I never believed or advocated that Moore should be prosecuted for those reasons. The document does not address whether Mr. Moore should be prosecuted. The statement was included, as were all

of the other statements in the document, because it helped demonstrate that Mr. Moore's and Mr. Reedy's actions, both legal and illegal, were part of a broader strategy implemented on behalf of the corporation.

54. I concluded that the lobbying and media efforts of REI were part of a broader effort, that included the use of the GAI consulting firm, to force changes in Postal Service procurement policy for the benefit of REI. It became my view that REI and Moore and Reedy legitimately could be prosecuted for their use of Gnau and the GAI firm. I concluded that because I also concluded that the evidence indicated knowledge on the part of Moore, Reedy and REI of the Voss kickback scheme and William Spartin's conflict of interest relating to changes in Postal Service managerial personnel. I also concluded that this scheme amounted to conspiracy to defraud the United States by trying to force changes in procurement policy on the Postal Service with the knowledge and expectation that those changes in policy would be corruptly and criminally influenced to REI's benefit by the actions of Voss, Gnau, Marcus and Spartin.

55. I also participated in drafting the document titled "Details of the Offense." In my experience, it is common for Postal Inspectors to include in memoranda submitted to United States Attorneys' Offices a detailed discussion of events they have investigated. This factual narrative often appears under a heading "Details of Offense." The document "Details of Offense" produced in our investigation of the Postal Service procurement scandal was designed to serve the same purpose. Where this document refers to lobbying and media contact by Moore, Reedy and REI it does so for the purpose of illuminating the events and transactions

at issue. This document was not intended to convey, and does not convey, any suggestion that Moore, Reedy or REI should be prosecuted for the purpose of retaliating for First Amendment activities. That was not my purpose, nor to my knowledge the purpose of any other Inspector who worked on the investigation, and I would not expect that the United States Attorney would be persuaded to indict by such a suggestion.

56. The decision to prepare summaries of information obtained in interviewing witnesses and to use those summaries in the grand jury was made by Mr. Valder. My understanding was that Mr. Valder had used this practice in past cases involving complex facts. We did not prepare the summaries for the purpose of falsely implicating Mr. Moore. The summaries also were not prepared to be used instead of live witnesses. I understood Mr. Valder's practice to be to read the narrative summary into evidence before the grand jury in the witness' presence and to ask the witness to adopt it in the presence of the grand jury. We did not use this practice to mislead the grand jury. We did not include any information in the summaries that was known by us to be false.

57. We did not "coerce or intimidate" William Spartin. We did nothing for the purpose of obtaining false testimony from Mr. Spartin for use against Moore. Mr. Spartin was represented by attorney Brian Gettings. Mr. Spartin entered into a non-prosecution agreement with the United States Attorney in April, 1986. With Mr. Getting's permission, we thereafter debriefed Spartin. Mr. Gettings consented to several of such debriefings without him or any other attorney from his firm being present. In the course of debriefing Mr. Spartin, we concluded that Mr. Spartin was not fully forth-

coming about events in which he was involved. Based on the answers that Spartin was providing in debriefings, I believed that Spartin was trying to protect his reputation and business prospects and was attempting to cooperate only to the extent the he did not implicate himself in the crimes under investigation. We identified six areas of misrepresentation by Mr. Spartin and summarized those in a document. The areas of Spartin's misrepresentation included: 1) That Spartin agreed to serve as GAI president as a favor to John Gnau, was a president in name only, did no substantive work for the firm, and received no compensation; 2) that Spartin embarked on a "one man crusade" to save former PMG Carlin's job and that his search was "above reproach;" 3) that Spartin did not intend to accept any funds from GAI because GAI's activities involving Voss were illegal and that Spartin only associated with GAI to help Spartin's firm, MSL International, obtain executive recruiting contracts and that Spartin did not associate with Gnau for any personal gain from any Postal Service contracts with REI; 4) that although Spartin arranged for Margaret Nunn (described to us as Voss' "girlfriend") to travel to three job interviews at MSL expense, Spartin was unaware that Voss and Nunn ordered additional airline tickets on MSL's account (we determined that in fact Spartin bribed Voss with free airline tickets); 5) that Spartin signed both of his March 1986 resignation letters, which were backdated to October 1, 1985 in order to cover up Spartin's conflict of interest (we learned that Spartin's son David signed the first letter, which Gnau refused to accept); and 6) that Spartin did not recall a meeting in Washington, D.C. on January 9, 1986 with Moore, Reedy, Frank Bray and Gnau (Gnau,

as well as Spartin's son David placed William Spartin there).

58. We raised our concerns with AUSA Valder and also discussed them with his supervisor AUSA William Block. Mr. Valder and Mr. Block were provided a copy of the document detailing Spartin's various misrepresentations. The United States Attorney's Office decided that a confrontation with Spartin was in order. An Inspector contacted Spartin to arrange a meeting at the United States Attorney's Office. Spartin was told that Mr. Gettings should attend. The purpose of the meeting was to confront Spartin with the misrepresentations described above.

59. It was at this meeting, where we confronted Spartin with the six areas of misrepresentations described above, where Mr. Valder tore up a copy of Mr. Spartin's nonprosecution agreement in the presence of Mr. Spartin and Mr. Gettings. The only purpose in tearing up the non-prosecution agreement was to emphasize to Mr. Spartin the seriousness with which the government viewed his failure to live up to the terms of his agreement.

60. No one threatened to prosecute Mr. Spartin's son, David, in order to coerce William Spartin to implicate Moore. We did discuss that Mr. Spartin's son was implicated in the conspiracy and contradicted William Spartin on a number of the facts as to which William Spartin was less than candid.

61. Although no one threatened to prosecute David Spartin, he was clearly implicated in the conspiracy and cover up. Our investigation revealed that David Spartin worked with William Spartin in connection with William Spartin's Postal Service recruiting. John Gnau

told us that he had informed David Spartin of the payoffs to Voss. When William Spartin attempted to cover up his conflict of interest as both the president of GAI and the man who recruited PMG Carlin's replacement, he enlisted David to draft and send to Gnau a backdated resignation letter to Gnau, which David Spartin signed for his father. David Spartin also lied to Postal Inspectors for the apparent purpose of covering up the fact that his father obtained Albert Casey's name from William Moore. David Spartin falsely told us that he was the one who found Casey's name while doing independent research on the PMG search project.

62. Mr. Valder did not tear up Mr. Spartin's immunity agreement in order to obtain false testimony for use against Moore. Although the extent of knowledge on the part of Moore, Reedy and REI was very much a subject of our investigation, the concern with Spartin at the time his nonprosecution agreement was torn up was his failure to be candid regarding the matters described above. It was not my purpose to coerce or intimidate Mr. Spartin and I have never coerced or intimidated a witness or taken any action to encourage a witness to give what I know to be other than truthful testimony.

63. The meeting at which Mr. Valder confronted Mr. Spartin and Mr. Gettings occurred in October, 1986. The polygraph test referred to in Moore's complaint where Spartin stated that he did not tell Moore or REI about the payoffs to Voss and was not present when anyone else might have told them occurred in December, 1986.

64. After the meeting in October, 1986, Mr. Gettings requested the opportunity to work with Mr. Spartin in the areas with which we were concerned. He also asked Mr. Valder for certain materials that Mr.

Gettings claimed would aid Mr. Spartin in recalling the events at issue. Mr. Valder provided those materials. Mr. Valder made the decision what materials to provide and gave them to Mr. Gettings to review with Mr. Spartin.

65. Mr. Gettings later informed us that Mr. Spartin claimed that his recollection was refreshed as the result of reviewing the materials Mr. Valder had provided. Mr. Gettings also said that Mr. Spartin had passed a privately administered polygraph and suggested that the government administer a polygraph. In light of Spartin's misrepresentations on other issues that we had documented, we decided to take Mr. Gettings suggestion and administer a polygraph regarding Spartan's statements that he did not tell Moore, Reedy, or REI of the Voss payoffs and was not present when anyone else might have told them.

66. The polygraph examination was administered by Inspector Norman Robbins. Inspector Robbins had no other role in our investigation. The result of the polygraph was no indication of deception on the issue of whether Spartin had told Moore or Reed of the Voss payoffs or knew of anyone else telling Moore or Reedy of the Voss payoffs.

67. Other than Mr. Gettings' statements that Mr. Spartin had passed a privately administered polygraph, we did not know how Spartin's polygraph examination would come out. The polygraph, like our confrontation with Spartin, was used for no other purpose than to ascertain the truth.

68. Inspector Kormann and I did not give former Postmaster General Paul Carlin a copy of a draft indictment to review. In late September, 1988, AUSA

Valder asked Inspector Kormann and I to verify certain facts in a draft indictment that had been prepared. Inspector Kormann and I interviewed Mr. Carlin at his home on September 22, 1988. Mr. Valder provided us a copy of the draft indictment, which Inspector Kormann and I took with us when we interviewed Mr. Carlin in order to verify the accuracy of some of the factual matters recited in the draft. Other than to tell Mr. Carlin that we wished to interview him regarding certain events relating to his service as Postmaster General, we did not further inform him of the purpose of our interview. We did not inform him that an indictment was being considered. We did not inform him that we had a copy of a draft indictment in our possession. We did not give Mr. Carlin a copy of the draft indictment.

I hereby declare that the foregoing is true and correct.

Executed on July 28, 2001

/s/ MICHAEL HARTMAN
MICHAEL HARTMAN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 92cv2288 (NHJ) (AK)
(consolidated with Civ. No. 93cv0324 (NHJ) (AK))

WILLIAM G. MOORE, JR., PLAINTIFF

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

DECLARATION OF JOSEPH B. VALDER

I, Joseph B. Valder, declare under penalty of perjury the following:

1. I have personal knowledge of the following facts, and, if called as a witness, could competently testify thereto.

2. I am an Assistant United States Attorney (AUSA) with the United States Attorney's Office for the District of Columbia, a position I have held since February 11, 1972. On May 8, 1986, I was assigned to work on a grand jury investigation, previously opened by AUSA Larry Barcella, into matters surrounding the Postal Service's procurement of optical character readers.

3. The investigation revealed that Peter Voss, a member of the Postal Service's Board of Governors, entered into an agreement with consultant John Gnau of Gnau & Associates, Incorporated (GAI), whereby Voss would refer clients to Gnau in exchange for a kickback on fees Gnau would be paid for obtaining government contracts for those clients. One such client was Recognition Equipment, Incorporated (REI).

Gnau agreed to split with Voss, and with GAI's President, William Spartin, and its Treasurer, Michael Marcus, a one percent contingency fee REI had agreed to pay Gnau if it received a United States Postal Service OCR production contract. As a result of the investigation, Voss pleaded guilty on May 30, 1986. Pleas by Gnau and Marcus followed on October 23, 1986, and January 20, 1987, respectively. On April 8, 1986, Spartin entered into a nonprosecution agreement with the United States Attorney's Office, as did Voss' assistant, Sharon Peterson, on September 8, 1986 and REI employee Frank Bray on June 9, 1987.

4. One question in the investigation concerned whether officials at REI knew of and participated in the conspiracy. Ultimately, the evidence convinced me that REI, William Moore and Robert Reedy must have known of and joined in that conspiracy. That evidence was wholly circumstantial. None of the admitted conspirators, Voss, Gnau, Spartin, Marcus or Peterson, ever claimed to have directly told Moore or Reedy about the criminal scheme. Instead, the entire premise of the government's case was that Moore and Reedy must have known of the conspiracy even though there was no evidence anyone ever openly discussed the existence of that conspiracy with them. Exchanges such the one between Reedy and Gnau in which Reedy asked "What is your deal with Voss" and Gnau responded that it was better that Reedy "not know"' the answer to that question, seemed to me a conclusive example of the conspirator Gnau's intention not to overtly discuss the conspiracy. My experience as a prosecutor had taught me that sophisticated criminals, especially those engaging in white collar fraud, are

careful to avoid conversations in which directly incriminating information is exchanged.

5. I never presented the matter to the grand jury as anything other than a circumstantial case where there was no direct evidence Moore and Reedy had been told of the conspiracy. For example, on March 19, 1987, I told the grand jury "we are now looking at some officials at a corporation in Texas that was involved. And the question is whether any of them should be indicted or not. It's really quite unclear at this time. Our sense is maybe there will be sufficient evidence to seek an indictment against one or more of them. But it's unclear." Exhibit 1 at 3-4. That same day I said to the grand jury that "[t]here is really only one question in this case anymore. And that is whether Reedy knew that he was, and participated, in acts which resulted in Voss being paid money in a personal capacity for official acts and influence at the Postal Service. And the same question as to Mr. Moore." *Id.* at 23-24.

6. On September 1, 1987, I told the grand jury:

> [I]t is very clear that there was a conspiracy. It is very clear that Reedy and Moore participated in all of the affairs and the events of the conspirators trying to get business from the Postal Service and getting a new PMG in, et cetera. The only question is whether there was knowing participation. And that is knowledge that there was a scheme to defraud going on, a conspiracy to defraud, bribery going on if they had—you know, since they clearly participate, because, you know, they are paying money to Gnau and giving him more money and all that, if while they are participating they are knowingly participating in the scheme to defraud, then

> that is the question you know. Do they have knowledge that there is a conspiracy going on or a scheme to defraud? That is the only question. And it is a very difficult question. And that is why we have these long statements, you know, getting down all these tiny little facts and facts and facts of who knew what when. That's what it really boils down to.

Exhibit 2 at 4-5. I also told them that

> the only place that there is any question about who knew what or who did what is that tiny, tiny area of what—to what degree of knowledge do Reedy and Moore have about, you know, did they know that Peter Voss was getting paid off. And that is why it comes back to that question of when Reedy says. you know, what is your arrangement with Voss in light of all this success and all that is going on, and Gnau says, 'It is better you not know.' What does the honest straight person say, they say 'What do you mean it's better I not know? I got to know. I mean, you can't have any kind of illegal relation with Voss. If you are paying him. I have got to go to the police or I have got to go to the FBI or something like that." And that might be what an honest person does. Or a person who is not involved knowing a criminal, et cetera.

Id. at 9-10.

7. On February 6, 1988. I told the grand jury "[n]ow, the thing that is interesting about this case is it is abundantly clear, and nobody will ever argue that there wasn't a conspiracy. It's abundantly clear, and nobody will ever argue that, REI did participate in it. You know, they where there, they retained Gnau, they

did this, they paid money, et cetera, da, da, da. The only question is whether REI knowingly participated in it. . . . . Did they knowingly participate in the conspiracy? That's a question. Okay. And that's why you have heard so much about names, dates and places, and who said what, who did what, et cetera. . ." Exhibit 3 at 14-15.

8. On February 23, 1988, while commenting on witnesses William Hittinger and Thomas Ringer, who were members of REI's Board of Directors, I told the grand jury

> The reason, in essence, that we've asked these gentlemen to come here is that we think it is relevant what they weren't told by Moore and [Reedy]. This whole pattern of Voss meeting with [Reedy], Voss calling, why haven't you hired non-associates [*sic*] [Gnau and Associates] . . . , agreeing to paying them one percent contingency fee; there's all sorts of things that, by and large, weren't told to the directors. It appears that one might conclude that they should have been told or would have been told some of this stuff, unless there was a reason to conceal from them this information, because it was known to Moore and [Reedy] that there was a crime afoot, and they were part of it.

Exhibit 4 at 2.

9. On October 4, 1988, while summing up to the grand jury why an indictment should be returned against REI, Moore and Reedy, I said the following:

> Let me just say in wrapping this up for you, ladies and gentlemen, it is a very large case in a sense. And the circumstances of cases are always like the

picture puzzle, the thousands and thousand of pieces, et cetera. And, you know maybe when Voss went and talked to Reedy and said, you know 'Gee, you need a new consultant,' you know, that's probably not enough to make him there is a scheme. But the repeated attempts by Voss, you know, 'Why haven't you signed the contract? Why haven't you signed the contract?' And then I think as you have known from the evidence, once they agree to the contract, Voss never calls him again. And, you know, then all of the good fortune happens. And no matter what, as that one chart shows, when it gets down to the point that Voss takes the document and gives it to Marcus at the Board of Governors meetings and Marcus a couple hours later gives it to Voss or to Moore and Reedy and Moore says, 'Well, that's good. I can use this at my testimony three days from now.' It all comes together right there. That it even doesn't have to be very *circumstantial* anymore. But that they know that they've got somebody who must be getting paid, that he's stealing documents for them. The whole PMG thing, getting Spartin in with the conflict, and Spartin calls him up and says—or Gnau calls and said, 'Spartin has got the contract. We think you guys should make the choice or the call.' Those are just some of the real main points. There is tons and tons of small things that fit together. But those are the main points of why we would recommend to you that it is appropriate to vote to indict this case.

Exhibit 5 at 18-19 (emphasis added).

10. The case was like a complicated puzzle of ten thousand pieces. One way I chose to make the evidence easier for the grand jury to evaluate was to employ

summary statements of witnesses. I had previously used such summaries in other cases. The summary procedure was not used in lieu of presenting live witnesses to the grand jury that investigated Moore, Reedy and REI. Instead, each witness whose testimony was presented in this manner was summoned before the grand jury, was present while I read the summary, and was asked to vouch both that the summary was read correctly (the witness was always requested to read along) and that it was true and accurate. Usually, but not always, I would also ask questions of the witness, and the grand jury was always presented the opportunity to do the same. The Postal Inspectors assigned to the investigation had written drafts of the witness summaries, based on their interview(s) of the witness. Before going into the grand jury, the witnesses were always provided with draft(s) and asked to offer any changes they might have. I made the final decision as to what would, or would not, be included in the summary statement as being appropriate evidence for the grand jury to hear. The summaries were read to the grand jury, and always recorded but not always transcribed. All summaries read to the grand jury were made grand jury exhibits.

11. One witness for whom the summary statement procedure was used was Frank Bray. Mr. Bray and his attorneys, Ellen Huvelle and Christopher Kearny, worked with me as well as with Postal Inspectors Frank Kormann and Michael Hartman at the United States Attorney's Office, over several days, to draft a summary statement. The negotiations over the content of Mr. Bray's summary continued into the early morning hours of the day of his grand jury testimony. I was not present for all of the negotiations, having left

some hours earlier due to a prior commitment. When I returned in the morning, Inspectors Kormann and Hartman informed me that they had worked through the night but had not been able to come to an agreement with Mr. Bray and his counsel over the contents of the final paragraph of Mr. Bray's summary statement. I resolved the matter by agreeing with Mr. Bray's counsel, Ms. Huvelle and Mr. Kearney, that we would delete the paragraph and that Mr. Kearney would give me, instead, a list of eight questions from which I, in my discretion, would choose to ask Mr. Bray before the grand jury those which I believed to be appropriate. A true and correct copy of the list of eight questions is attached to my Declaration as Exhibit.

12. On the afternoon of October 24, 1986, I met with William Spartin and his attorney, Brian Gettings. Also present at this meeting were Postal Inspectors Kormann and Hartman. I believe Postal Inspector David Smith also attended. I do not recall for sure whether Postal Inspectors Robert Edwards or Pierce McIntosh were there or not. On April 8, 1986, Spartin had entered into a nonprosecution agreement with the United States Attorney's Office, under which he was obligated to cooperate in the investigation and to provide truthful information. In my estimation, Spartin appeared not to be living up to that agreement. With Mr. Gettings' permission, Inspectors Hartman and Kormann had been debriefing Mr. Spartin throughout the summer of 1986, usually without Mr. Gettings or myself being present. Inspectors Hartman and Kormann reported to me their concern and information showing that Spartin was not providing complete and truthful information, and I then concurred in that assessment. After consulting with my supervisors at the U.S. Attorney's Office, Assistant

United States Attorneys William S. Block and Steven R. Spivack, and sharing with them a document prepared by the Postal Inspectors that detailed Mr. Spartin's misrepresentations, a copy of which is attached to this declaration as Exhibit 7, I decided to confront Mr. Spartin with proof of his falsehoods and to impress upon him the seriousness of his failure to abide by the terms of his nonprosecution agreement by tearing up a copy (not the original) of that agreement. Mr. Spartin and Mr. Gettings were asked to come to a meeting at the United States Attorney's Office. At that meeting, I told Mr. Spartin that I did not believe he was telling the truth, and I tore the copy of the agreement in half, as I had planned to do with my supervisors. I kept the torn copy in my case file, and it was admitted as exhibit during the trial of Moore, Reedy and REI.

13. During and after the October 24, 1986, meeting, Mr. Gettings told me that Mr. Spartin was not making deliberate misrepresentations but instead was simply unable to recall certain events. In response to Mr. Gettings' representations, my supervisors and I agreed that, to be fair to Mr. Spartin if there was a possibility we might revoke his non-prosecution agreement, we should allow Mr. Spartin to refresh his recollection to the fullest extent possible. In an effort to refresh Mr. Spartin's recollection thereafter, I allowed him and his counsel to review documents, most of which were copies of his own personal records. In addition, again in an effort to refresh his recollection, I showed Mr. Spartin and Mr. Gettings a collection of excerpts from the summary statements of Sharon Peterson, Michael Marcus, John Gnau and Peter Voss. I did not tell Mr. Spartin that he was being shown grand jury information nor did I regard the summaries as such. In my view

the summaries were not grand jury information because they had an existence separate and apart from the grand jury process.

14. Shortly before I asked the grand jury to return an indictment against Moore, Reedy and REI, I asked Inspectors Kormann and Hartman to interview former Postmaster General Paul Carlin in order to verify the accuracy of certain facts set forth in the then current draft of the prospective indictment. Inspectors Kormann and Hartman, following my directions, interviewed Mr. Carlin and reported to me the results of that interview.

15. The decision by United States Attorney Jay Stephens to seek the indictment of Moore, Reedy and REI was the culmination of a series of twenty-four separate meetings I had with varying combinations of my supervisors both in the United States Attorney's Office and the Department of Justice starting on February 17, 1988, and ending on September 30, 1988. In each of these meetings, I stated my strong belief that the evidence gathered by the United States Postal Inspection Service and presented to the grand jury was sufficient to ask the grand jury to return an indictment. In addition, on September 22, 1988, I attended a meeting at which counsel for Moore, Reedy and REI presented to Mr. Stephens their arguments in support of their contention that no indictment should be sought. On September 30, 1988, I was present when Moore, Reedy and REI's counsel met with John C. Keeney, then Deputy Assistant Attorney General and Mr. Stephens, and again presented their arguments against indictment. After the meeting with REI's counsel, Mr. Keeney, however, determined that he would not take a position either for or against Mr. Stephen's pending

decision to seek an indictment. Ultimately, Mr. Stephens determined that the grand jury would be asked to return an indictment

16. After reviewing my diary entries for October 3, 1988 (the next business day after the Keeney meeting referred to in the previous paragraph), I recall that REI attorneys John Cooney, Marshall Searcy, Tom Loose and Robin Hartman proposed to me that REI would enter a misdemeanor plea and pay a fine of some amount in return for the United States not seeking an indictment of REI, Moore and Reedy. After discussions with my supervisors, this proposal was rejected.

17. That the case against Moore, Reedy and REI was entirely circumstantial was made known by me to all of my supervisors and Department of Justice officials and all of our communications about the case took that into account. There was never any suggestion made that, or question raised about whether, any of the co-conspirators had explicitly told Moore or Reedy of the conspiracy. I advised all of my supervisors that no one had directly told Moore or Reedy of the conspiracy and that the case was based on circumstantial evidence that Moore and Reedy must have known. The persuasiveness of that circumstantial evidence was heavily debated during the course of my many discussion with my supervisors. Charles Leeper who was Deputy Chief of the Special Prosecutions Section of the United States Attorney's Office was of the view that evidence was insufficient to warrant proceeding with the case. I was present at meetings during which Mr. Leeper expressed to Mr. Stephens his (Mr. Leeper's) mind set that the evidence developed in the investigation was not strong enough to proceed. Paul L. Knight, then the Chief of the Special Prosecutions Section initially

shared Mr. Leeper's view of the evidence. Eventually, however, Mr. Knight told Mr. Stephens, other relevant supervisors and me that he had changed his mind and had come to believe that the evidence was strong enough to warrant seeking an indictment. Ultimately, after meeting with counsel for Moore, Reedy and REI and with further review by Mr. Keeney all of which are described above, Mr. Stephens decided that an indictment should be sought against REI, Moore and Reedy. Mr. Keeney had declined to interfere with that decision and on October 6, 1988, the grand jury voted to indict and did return an indictment against REI, Moore and Reedy.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ JOSEPH B. VALDER
JOSEPH B. VALDER
Assistant United States
Attorney

Dated: July 30, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 92cv2288 (NHJ) (AK)
(consolidated with Civ. No. 93cv0324 (NHJ) (AK))

WILLIAM G. MOORE, JR., PLAINTIFF

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

DECLARATION OF ROBERT J. EDWARDS

I, Robert J. Edwards, declare under penalty of perjury the following:

1. I have personal knowledge of the following facts and, if called as a witness, could competently testify thereto.

2. I am an employee of the United States Postal Service, currently employed as a Manager for Global Business Development. From 1975 until 1999, I was employed as a Postal Inspector with the United States Postal Inspection Service. In mid-1985, while I was employed as an Inspector in the Office of Audit, Chief Postal Inspector Charles Clauson asked me to monitor the procurement process for the purchase by the Postal Service of multi-line read optical character scanning equipment. Chief Inspector Clausen told me that I should keep a close eye and ear on what was going on with the procurement, due to concerns about the actions of some members of the Postal Service Board of Governors. I had previously been employed as an Inspector in the Special Investigations Division of the

Inspection Service, where among other things, I had worked on, learned the history of, and reported concerns about the Postal Service's automation efforts.

3. Optical character reading equipment is used by the Postal Service to read, code and sort letter mail for delivery. Beginning in 1960, the Postal Service contracted with various private companies for research, development and funding of automated systems to read, code and sort mail. Among the systems developed were single-line optical character readers (SLOCRs) and multi-line optical character readers (MLOCRs). SLOCRs worked by reading the last line of a piece of mail and using the information found there to code and sort the mail for delivery. For the most efficient sorting, the SLOCR equipment was largely dependent on the application by the mailer of a nine-digit zip code, also known as "Zip + 4." The MLOCR equipment was designed to read more than one address line and translate the information into a bar code corresponding to the nine-digit zip code for that address. It was not dependent on Zip + 4 use by the mailer. During the 1970s, Recognition Equipment Incorporated (REI) received research and development contracts from the Postal Service to develop a multi-line OCR.

4. In 1984, the Postal Service, with the unanimous endorsement of the Board of Governors, elected to purchase single-line OCRs and to wait until 1987 to decide whether it needed to use multi-line OCRs such as those REI wished to sell to the Postal Service. The Postal Service determined that if large institutional mailers could be persuaded to use Zip + 4, the savings captured on volume mail would make the single-line machines the most cost-effective choice. It therefore offered rate incentives to volume mailers in order to

encourage them to employ the nine-digit zip code. The plan was to reevaluate the situation in 1987 in case Zip + 4 use by large volume mailers failed to meet projections. If that happened, the Postal Service would then acquire multi-line equipment, most likely through the retrofit of single-line OCRs. The purchase of the single-line machines was known as the "Phase II" procurement.

5. As a result of the performance of my official duties, I became aware that, early in 1985, a concern developed that the Technology and Development Committee of the Board of Governors was pressuring postal managers to accelerate the purchase of multi-line OCRs. However, when Mr. Clauson assigned me to monitor the multi-line effort, that concern was considered a developmental audit issue. The Inspection Service was monitoring the overall Postal Service automation program for the purpose of detecting and preventing waste, fraud and abuse. This monitoring was known as a developmental audit. Although the facts disclosed by the developmental audit of the OCR procurement raised questions, both to me and to others in the Postal Service, about the conduct of some members of the Board of Governors, at the time of my assignment to the developmental audit no criminal investigation had yet been initiated.

6. As a result of conducting my official duties, I learned that, on July 8, 1985, the Board of Governors conveyed to Postmaster General Paul Carlin its view that the decision on a midcourse correction should be made immediately rather than waiting until 1987 and that the Postal Service should change its course to employ MLOCRs rather than SLOCRs. On July 14, 1985, Postmaster General Paul Carlin informed the

Board of Governors that postal management was unequivocally committed to this midcourse correction to bring the Postal Service into a full multi-line environment, whether it be by acquiring new multi-line machines, modifying single line machines by retrofitting them to take on multi-line capability or by some combination of these approaches. The Postal Service then announced new procurement for both multi-line OCRs (known as the "Phase II" procurement) and for kits to retrofit the newly-acquired Phase II single line machines (the "Phase IIA" procurement.)

7. Chief Postal Inspector Clauson informed me that, on July 18, 1985, Deputy Postmaster General Jackie Strange reported to him that Peter Voss, who was Vice Chairman of the Postal Board of Governors, was strongly pressuring her to steer the procurement of multi-line OCR's to Voss' preferred vendor REI. Mrs. Strange said that she had no evidence of criminal conduct but was concerned about Mr. Voss' motives and feared he was motivated by some personal interest rather than the best interests of the Postal Service.

8. Mr. Clauson told me that, on July 26, 198, Mrs. Strange told him she had reevaluated the situation and now thought that Voss had the best interests of the Postal Service at heart and attributed his actions to the intense atmosphere surrounding the issue of MLOCRs that had resulted in "hard exchanges" between she and Voss. Mr. Clausen told me that Mrs. Strange's changed story raised his suspicions about the possibility of improper conduct by Voss. My own suspicions were also raised by Mrs. Strange's conflicting reports.

9. Another event that aroused my suspicion was an allegation made to the Inspection Service by officials of AEG Telefunken, a West German company, against

William G. Moore of REI. The allegation arose from the Phase IIA retrofit progam. Using technology licensed from Telfunken, Electrocom Automation (ECA) of Arlington, Texas had won the 1984 "Phase II" single-line competition. ECA now was competing for a contract to conduct the Phase IIA retrofitting of those machines, as was REI. In order to develop a retrofit kit, REI needed technical information from ECA. ECA and Telefunken were concerned about revealing trade secrets to a competitor. According to a report made by ECA and Telefunken to the Postal Inspection Service, at a meeting on October 17, 1985, Moore had proposed that the two companies split the procurement, with ECA and Telefunken taking the contract to retrofit their machine and REI taking the contract to manufacture new MLOCRs. The companies also reported that Moore had said he would use his political influence to end the retrofit program unless they agreed to the contract-splitting proposal.

10. On November 6, 1985, Postal Inspector Michael Hartman and I interviewed Telefunken's Kurt Scheidhauer, and, on November 7, 1985, we interviewed Leopold Dieck, also a Telefunken official, regarding their allegations against Moore. On November 19-20, 1985, we interviewed Moore as well as REI officials Robert Reedy and Frank Bray about the allegations made by Telefunken. Near the end of the interview of Moore, Reedy and Bray, Inspector Hartman asked whether any of them had met individually with members of the Board of Governors. Reedy said no, and Moore and Bray indicated agreement.

11. After conducting these interviews, Inspector Hartman and I met with attorneys William Hardy and Allen Carver of the United States Department of

Justice Criminal Division's Public Integrity Section. Mr. Hardy was the Supervisor of the Public Integrity Section's Fraud Division. He met with us for more than two hours (we met with Carver more briefly), during which time we told him about Deputy Postmaster Strange's allegations about Voss and the OCR program and about Telefunken's contract-spitting allegations against Moore. Hardy and Carver told us that there did not appear to be direct evidence of a federal crime, at least at that point, but advised us that we should continue to investigate. Hardy told us that in his opinion, gratuities would be forthcoming and that we should research financial statements and other evidence to determine whether illegal payments were being made. Hardy and Carver told us that we should investigate whether anyone at REI had made a false official statement and suggested that we investigate REI's intention and capability of actually competing on the Phase II conversion program, also known as Phase IIA. They also told us that we should be alert for a pattern of irregular, possibly unethical behavior, examine the postal contracting regulations governing sole source procurement and consider the relevance of those regulations to the multiline OCR procurement. Hardy and Carver also advised that we should have further discussions with Mrs. Strange about her original allegations.

12. After meeting with Hardy and Carver, I prepared a memorandum to Chief Postal Inspector Clausen, from Inspector Hartman and I, dated November 8, 1985, recording what had been discussed during the meeting, a true and correct copy of which is attached to this declaration as Exhibit 1. In the memorandum, Inspector Hartman and I told Chief Inspector Clausen

that the approach we would be taking pointed toward conspiracy, mail fraud and ethics violations, and that an investigation of this sort would require full time attention. We also outlined the initial steps we felt should be taken to determine whether or not any crime might be afoot. We suggested that Inspector Hartman go to Chicago in order to review OCR acceptance tests that were being conducted there and to see an REI machine that was then operating in a Chicago post office. We also suggested creating a complete subject file, including Congressional testimony and REI correspondence, and using that information to prepare a narrative brief of the salient points. I viewed all of these actions as implementing the investigative steps outlined by Hardy and Carver, that is, to look for evidence of illegal gratuities and, by examining REI's intention and capability of actually competing in the procurement, to evaluate whether REI might have made a false official statement. Mr. Clausen approved our plan and a task force was eventually established to look into the OCR procurement.

13. Our purpose in undertaking these inquiries was not to retaliate against anyone because of their protected First Amendment activity, but rather to determine whether there was evidence of any criminal activity connected to the OCR procurement. As Hardy and Carver had advised, to make that determination, it was necessary to investigate REI's intention to actually compete on the procurement and its capability to do so. The steps REI had already taken in pursuit of the contract, including any statements to members of Congress or other government officials, seemed to me one source of evidence about the company's motives and its capability of actually competing for the procurement.

14. On February 23, 1986, at the request of Chief Inspector Clausen, I flew to Sarasota, Florida, in order to attend a February 24, 1986, meeting of the Board of Governors' Technology and Development Committee. While seated in the coach section of a Presidential Airways flight to Sarasota, I observed Peter Voss board the plane and sit in the coach section. He did not appear to notice me. The next day, during a lunch with the meeting attendees, there was a casual conversation about the availability of airline service into Sarasota, during which someone mentioned that Presidential Airways had just begun to fly there. In my presence, Mr. Voss said to the other participants in this conversation that he had never flown on Presidential and had flown to Sarasota on United Airlines instead. Having observed him on my Presidential Airways flight the day before, I knew that Voss' statement was untrue. I also knew that, as member of the Board of Governors, Voss was authorized to travel by first class at government expense. My suspicions were aroused by this unusual, irregular behavior by Voss and I decided to conduct a review of the Board of Governor's travel vouchers and expense records.

15. That review showed that Voss was submitting false claims for travel and administrative expenses. He would purchase a first class ticket , but instead of using it, would return it for credit and pay cash for a coach ticket. He would then use the coach ticket for his official travel and pocket the difference. He also lied about his itineraries in order to inflate the amount of official travel reimbursement he claimed. Through these means, Voss was able to defraud the government of more than $44,000 in travel expenses.

16. The matter was brought to the attention of Assistant United States Attorney Larry Barcella of the United States Attorney's Office for the District of Columbia. Mr. Barcella opened a grand jury investigation and Voss' financial records were subpoenaed. Among the documents received as a result of the subpoena were checks from REI consultant John Gnau to Voss' company. After investigating further, we learned that Voss was being paid kickbacks by Gnau in order to steer the OCR procurement to REI. The gratuities that Department of Justice attorneys Hardy and Carver had predicted were thus revealed and, on May 30, 1986, Voss pleaded guilty to federal criminal charges.

17. Our investigating showed that joining Gnau and Voss in this criminal conspiracy was Michael Marcus, an employee of GAI and William Spartin, an executive recruiter. Spartin, who had received a contract to recruit a replacement for Postmaster General Paul Carlin was president of MSL International Consultants, Ltd. and, as it turned out, was also president of GAI. REI had agreed to pay GAI a one percent contingency fee if it received an OCR production contract. We learned in our investigation that the potential value of the procurement was something between $250 and $400 million. Gnau, Voss, Marcus and Spartin entered into an agreement to split the contingent fee Gnau would receive, which would have amounted to approximately $2.5 to $4 million. Gnau and Marcus entered guilty pleas, while Spartin entered into a nonprosecution agreement with the United States Attorney's Office under which he agreed to cooperate and provide truthful information in the investigation.

18. While I was working on the criminal investigation, Chief Inspector Clausen asked me to assist in preparing a report for the House of Representatives Committee on Post Office and Civil Service. Mr. Clausen reported to me that, on June 6, 1986, the members of that Committee had sent a letter to him requesting a comprehensive written report of the Inspection Service's findings on all non-criminal matters relating to the Postal Service's "Zip + 4" program, the purchase of OCRs, and the process by which the expenses of the Board of Governors were processed and audited. I was given a copy of that letter at the time Mr. Clausen assigned me to the project and a true and correct copy is attached to this declaration as Exhibit 2. In accordance with Chief Inspector Clausen's direction, I assisted in the preparation of what came to be called the "Zip + 4 / Automation Investigative Report," the final version of which was provided to Congress in January 1987. I was responsible for preparing all but one section of that report. The section I did not prepare was entitled "Conspiracy Investigation." The Zip + 4 / Automation Investigative Report was prepared solely for the purpose of responding to the request by the House Committee on Post Office and Civil Service for such a report.

19. In October 1986, I was present during a meeting between AUSA Joseph Valder, Spartin and Spartin's attorney, Brian Gettings, at which a copy of Spartin's nonprosecution agreement was torn in half by AUSA Valder. I recall that Postal Inspectors Frank Kormann and Michael Hartman also attended this meeting. Inspector David Smith may also have been there, but I am not sure of that. I do not recall whether Inspector Pierce McIntosh was present. I recall that in the

meeting AUSA Valder said, in substance, that he thought Spartin had not been telling the government the truth. At some point, AUSA Valder tore the agreement in half. I do not recall whether I knew in advance that this would occur, but when it happened, I thought that it was not a very convincing display by Mr. Valder. To me, the event seemed contrived and I was not convinced that Mr Valder had any serious intention of revoking Mr. Spartin's nonprosecution agreement.

20. My involvement with the Task Force ended in January 1987. I did not participate in any way in the recommendation I understand was later made by the Inspection Service that the United States Attorney should seek the indictment of William Moore.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ ROBERT J. EDWARDS
ROBERT J. EDWARDS

Dated:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 92-2288 (NHJ) (AK)
(consolidated with Civ. No. 93-0324 (NHJ) (AK))

WILLIAM G. MOORE, JR., ET AL., PLAINTIFFS

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

DECLARATION OF FRANK W. KORMANN

Pursuant to 28 U.S.C. § 1746, I, Frank W. Kormann. hereby make the following unsworn declaration in support of the United States Defendants' Motion for Summary Judgment.

1. I have personal knowledge of the following facts and if called as a witness could testify competently thereto.

2. Between 1974 and 1999, I was employed by the United States Postal Inspection Service as a Postal Inspector. The mission of the Postal Inspection Service is safeguarding the integrity of the United States mails and the integrity of the United States Postal Service systems, operation and property.

3. In December, 1985, I was assigned to work on the investigation of optical character reader ("OCR") procurement. I worked on the investigation through the indictment, trial and acquittal of William G. Moore, Jr., Robert W. Reedy and Recognition Equipment, Incorporated ("REI"). I became very familiar with the

facts and circumstances under investigation and the evidence obtained in the investigation.

4. As the result of the evidence the Inspection Service and the grand jury obtained in the course of the investigation, we determined that REI hired John Gnau and his consulting firm, Gnau and Associates Incorporated ("GAI") in an effort to sell multiline optical character reader equipment to the Postal Service. We also determined that GAI paid kickbacks to Postal Governor Peter E. Voss from fees REI paid GAI and that Voss, Gnau, Michael Marcus and William Spartin of GAI planned to split a one percent contingent fee REI promised to pay if REI obtained an OCR production contract.

5. As the result of our investigation, I concluded that REI and William G. Moore, Jr. and Robert Reedy acquired knowledge of the Voss-Gnau kickback scheme and of a personnel recruitment scheme by which William Spartin would use executive recruitment contracts received from the Postal Service to place postal officials thought favorably disposed to REI. Because I concluded that Moore, Reedy and REI acquired such knowledge in the course of their efforts to sell REI's OCR system to the Postal Service, I also concluded that Moore, Reedy and REI joined a conspiracy to defraud the United States. All of my actions taken in respect of Moore, Reedy and REI were taken in a good faith effort to ascertain the truth and to bring to justice those I believed had committed prosecutable offenses. Neither I, nor any other Inspector working on the OCR procurement investigation, sought to prosecute Moore to retaliate for his criticism of Postal Service procurement decisions. I had no personal or professional stake in what kind of OCRs the Postal Service purchased,

whom it purchased them from, or how any procurement of OCRs might be structured. My only interest was in understanding how the conspiracy we uncovered operated and how it might have corrupted the decision making process.

6. It is difficult to fully detail all of the evidence that led me to conclude that Moore, Reedy and REI knowingly participated in the conspiracy we uncovered. I assisted in preparing for the United States Attorney a document titled "Details of Offense" that accurately lays out the facts and circumstances upon which I based my conclusion that Moore, Reedy and REI knowingly participated in the conspiracy to defraud the United States. A true copy of that document is attached as Exhibit 1 hereto.

7. Among the facts upon which I concluded that Moore, Reedy, and REI knowingly conspired to defraud the United States are the following: In 1984, REI did not win the Postal Service's Phase II procurement for single line OCR machines. That, and the fact that the Postal Service planned not to revisit the question whether to acquire multiline OCR technology for some time, meant that REI had no immediate prospects of Postal Service business, and REI appeared prepared to abandon its postal program. Governor Voss made personal telephone contact with REI President Moore, and Voss and REI Vice President Robert Reedy dined together over the Labor Day weekend in 1984. At that meeting, Voss recommended that REI hire a new consultant, John Gnau and his firm Gnau and Associates, Incorporated ("GAI") to market its OCR system to the Board of Governors and the Postal Service. According to Moore's account when we interviewed him on July 25, 1986, Reedy reported to him afterward on Reedy's

meeting with Voss, and Moore was anxious to hire the consultant Voss recommended.

8. Between September and December, 1984, Voss followed up with a number of telephone calls to Reedy and Moore apparently encouraging them to hire Gnau. I thought this level of interest by a governor in a potential vendor's choice of consultant was suspicious and that Moore and Reedy, as astute businessmen, also should have thought so. Just about the same time that REI retained GAI in early January, 1985, there was an abrupt discontinuance of telephone contact between Moore and Reedy, on the one hand, and Voss on the other, with no evidence of any further telephone contact between Moore and Reedy and Voss. I thought the abrupt discontinuance of telephone contact also was strange. In my view, if Voss truly were an "independent ally" of REI, as Moore, Reedy and REI later would claim, there was no logical legitimate reason why Moore, Reedy and REI would not continue direct communication with that ally, especially given an ally so highly placed. I was aware that Moore had often communicated directly with high level Postal Service officials in the past, including Governor Voss and former Postmaster General William Bolger.

9. When interviewed on April 8, 1986, Reedy lied to Inspectors about how REI came to retain GAI. In my experience as a criminal investigator, people lie to investigators about important facts in order to avoid the detection of their criminal acts and the criminal acts of others. It also appeared that Reedy, Moore and REI's Frank Bray lied in a November 20, 1985 interview when they were asked if they had ever met individually with a member of the Board of Governors, and they indicated that they had not.

10. John Gnau told us of various conversations with Reedy that in my view, reflected a tacit understanding and acceptance of the Voss-Gnau relationship. According to Gnau, Reedy on occasion asked in substance what Gnau's relationship was with Voss. Gnau said that he always told Reedy that it was better Reedy not know. Gnau told us that he told Reedy not to refer to Voss by name, but as "our friend" and Reedy responded "I understand." Gnau reported that prior to a meeting with several Governors, including Governor Voss, he told Reedy that the other Governors did not need to know that Gnau and Voss knew each other. Gnau stated that at a time when he negotiated fees for a public relations contract with REI, Reedy remarked to Gnau that he knew Gnau had people to "take care of." Gnua told us that his impression at the time of the conversation was that Reedy meant Voss. GAI's Michael Marcus told us that on one occasion either Moore or Reedy remarked to Gnau and Marcus "[w]hy don't you get Peter Voss to order sole source?" Moore's notes contained an entry, dated April 29, 1985, that read: "Consultant wired—(Peter Voss)."

11. GAI's Michael Marcus told us that Voss leaked internal confidential Postal Service information to him and that he shared it with REI's Reedy and Bray. With Reedy's and Bray's assistance, Marcus prepared memoranda and position papers that he sent to Voss and that Voss circulated within the Postal Service while misrepresenting them as his own work product. Moore's notes also reflected Moore's knowledge of closed Board of Governor's sessions. For example, one such entry reflected topics under discussion by the Governors and apparent positions of various Governors, under the healing "Closed Session."

12. In interviews, Moore and Reedy appeared to downplay the extent and nature of their contact with Spartin. For example, Moore told us in an interview on July 25, 1986 that he was uncertain of GAI president William Spartin's role in GAI efforts and said "[w]e kind of ignorerd him." Moore acknowledges, however, that Spartin called him for candidates to replace Paul Carlin as Postmaster General ("PMG") but claimed that he did not at first believe that Spartin was recruiting for a new PMG. Moore, however, assisted Spartin both by providing him with the name of Albert Casey and making a phone call to Casey to see if Casey would accept Spartin's call. In a memorandum reporting to Moore on the status of REI's OCR efforts, Reedy remarked: "I don't have to tell you how fragile the situation is. I think you got some sense of this from talking to Spartin; however, I think the basic tactics are correct, the economics are on our side and we have chosen well, so let's see where it goes." We also learned that April 8, 1986, after the interview in which he lied to Inspectors about how he obtained Gnau's name, Reedy placed a phone call to Spartin.

13. Gnau, Marcus and Spartin all implicated Moore and Reedy in discussions of cover stories and file purges. REI claimed it was unable to locate records in response to subpoenas. Moore's telephone log for the period October 19, 1984 to January 15, 1955 (identified as Log No. 4) was never turned over to the grand jury. Telephone toll records for Moore for January, February, April, November and December 1984 and January 3 and 4, 1985 never were turned over to the grand jury. Reedy's telephone toll records for January, February, April, May and December, 1984 and January, March and April 1985 never were turned over. Moore's "Pos-

tal" Notebook was turned over to the grand jury, but was missing almost half its 80 pages, with no apparent explanation. REI's failure to produce these documents made examination of events during the periods of time for which records were not produced more difficult, and in my mind was additional evidence tending to support the conclusion that Moore, Reedy and REI knowingly participated in the conspiracy and were trying to hide that.

14. One of Moore's chronological notebooks contained the following entry for January 7, 1987:

"A lot of homework; drive a wedge between people",

"(intimidate)",

"Answer I don't know, I really can't remember",

"Excitable",

"All kinds of scenarios",

"Ask same questions over and over",

"Don't relax" "Long interrogation, tough questions at end)",

"Possible subpoena".

REI employees subsequently testified to the grand jury that Moore made comments to this effect in a staff meeting that day. I became aware that prior to January 27, 1987, Inspector Hartman had made arrangements with REI's general counsel for us to come to REI the following week to interview REI employees. In light of the evidence that we received that Moore and Reedy had discussed cover stories and file purges, the missing REI records described above and Moore's comments to his staff greatly concerned me.

15. Assistant United States Attorney ("AUSA") Joseph Valder made the decision to prepare summary statements to be read into evidence before the grand jury. As I understood Mr. Valder's practice, the witness would be present when the statement was read to the grand jury and would be asked if the statement had been read correctly and if it was true. I understood that Mr. Valder had used this practice in other cases in the past. This practice was not used for the purpose of falsely implicating Moore.

16. Witness William Spartin was not "coerced or intimidated." We did not do anything in respect of Mr. Spartin to influence him to give false testimony implicating Moore. A copy of Mr. Spartin's immunity statement was not torn up because he refused to implicate Moore. Between April, 1986, when he obtained a non-prosecution agreement from the United States Attorney, and October, 1986, Mr. Spartin had been extensively debriefed by Inspectors, including me. We concluded that Mr. Spartin was not being fully truthful in several areas. I have reviewed the documents attached hereto as Exhibits 2 and 3. I recognize them to be handwritten and typed copies of a document from the Inspection Service case file that were prepared to document Mr. Spartin's lack of candor. These documents set forth the areas in which we had concluded that Mr. Spartin was not fully forthcoming in our debriefings. My belief, based on my discussions with Mr. Spartin and observations of him, was that he wished to continue with his business career and was unwilling to fully implicate himself in the events we were investigating. I felt that because he was unwilling to acknowledge the full extent of his own participation in the events we were investigating that he was not

living up to the terms of his cooperation agreement with the United States by giving complete and truthful disclosure of what he knew.

17. We related our concerns about Mr. Spartin to the United States Attorney's Office, where it was decided that a meeting with Spartin and his attorney, Brian Gettings, was in order. Mr. Spartin and Mr. Gettings were invited to a meeting at the United States Attorney's Office. We met in a conference room. At that meeting, Mr. Valder tore in half a copy of Spartin's non-prosecution agreement. My understanding, then and now, is that Mr. Valder took this action for the purpose of underscoring to Mr. Spartin and Mr. Gettings the seriousness of the government's concern about Mr. Spartin's lack of candor and that his immunity was in jeopardy. It never was my understanding or purpose that this action be taken to influence Mr. Spartin to implicate Mr. Moore. The meeting was conducted in a professional manner sitting around a conference room table. No one from the government side raised their voice or behaved in a manner physically intimidating to Mr. Spartin, who was accompanied at all times by his attorney, Mr. Gettings. As we reviewed the areas in which we believed that Mr. Spartin had not been candid, Mr. Spartin interjected from time to time expressing his concern and agitation that we did not believe him. When that happened, Mr. Gettings would calmly advise Mr. Spartin to wait, let us have our say, and then he and Mr. Spartin would respond.

18. Mr. Gettings informed us that his client had trouble remembering events clearly and also had engaged in a process that Mr. Gettings referred to as "backing and filling." Mr. Gettings explained that by this he meant that Mr. Spartin would describe an event

only in general terms—"hitting the highlights," he explained—and would go back and fill in details only if he realized that we wanted those details. My perception, based on our interviews with Mr. Spartin, was that he omitted many potentially important details when interviewed and that he provided those details, usually in a later interview, only when he realized that we already had learned them and he had little choice but to acknowledge them. Mr. Spartin's technique of "backing and filling," as Mr. Gettings described it, is the reason that numerous interviews with Spartin were required to obtain full and complete information from him. Mr. Spartin was not interviewed on multiple occasions because we were trying to force him to falsely implicate Moore.

19. As a result of our meeting with Mr. Spartin and Mr. Gettings, Mr. Gettings asked for the opportunity to try to refresh his client's recollection so that Mr. Spartin could make a more full and complete disclosure of all that he knew. Mr. Valder agreed and also agreed to provide Mr. Gettings certain materials to use for this purpose.

20. A copy of Mr. Spartin's non-prosecution agreement was torn up for the reasons explained above. It was not torn up in the October, 1986 meeting because of anything Mr. Spartin said in a polygraph examination. Mr. Spartin underwent the only polygraph examination administered to him by the Inspection Service in December, 1986, after the meeting at which the non-prosecution agreement was torn up. By that time, Mr. Gettings and Mr. Spartin claimed to us that Mr. Spartin had recovered his memory. The polygraph was administered by Inspector Norman Robbins, who had no other role in our investigation. The result of that

examination was that Spartin was determined not to be deceptive in his claims that he had not told Moore of the kickback scheme and that he was not present when anyone else told Moore. We accepted that.

21. We did not threaten to prosecute Spartin's son in order to force Spartin to falsely implicate Moore. In April, 1986, when William Spartin had agreed to cooperate, his attorney, Mr. Gettings, had assured us that William Spartin would in fact fully cooperate and that there was no need for us to go back and interview Mr. Spartin's son. Mr. Gettings explained that one of the reasons that William Spartin agreed to cooperate was out of a desire to shield his son from further scrutiny and concern over his son's involvement in the events under investigation. We had evidence that Spartin's son was implicated in the conspiracy and contradicted his father in respect of several of the areas of misrepresentation described in Exhibits 2 and 3, however. For example, we knew that David Spartin had signed his father's name to a back-dated letter resigning the presidency of GAI. We made that known to Mr. Spartin and Mr. Gettings and also made known that if Mr. Spartin was not going to fully disclose all that he knew as he had promised we were prepared to pursue his son's knowledge of the matters under investigation. I do not recall anyone "threatening" to prosecute David Spartin, but there was a frank discussion of David Spartin's role and the fact that we were prepared to obtain evidence from David Spartin if necessary and pursue that evidence as appropriate. From the context of the discussion, Mr. Gettings and Mr. Spartin might have recognized the possibility that David Spartin could be prosecuted as the result of our futher scrunity, and that was one of the things Mr.

Gettings told us William Spartin hoped to avoid in entering the cooperation agreement. No one from the the Government made any "threat" to prosecute David Spartin, however. We certainly did not threaten to prosecute David Spartin in order to force William Spartin to falsely implicate Mr. Moore.

22. Inspector Hartman and I did not give former Postmaster General Paul Carlin, a copy of a draft indictment to review. In late September 1988, AUSA Valder asked inspector Hartman and I to verify certain facts in a draft indictment that had been prepared. We interviewed Mr. Carlin at his home on September 20, 1988. A true copy of the draft that we had with us at the time of Mr. Carlin's interview is attached as Exhibit 4 hereto. In the margins next to certain text is the notation "OK" in my handwriting. That notation reflects our conclusion that the passage accurately describes the events therein. We did not show the document to Mr. Carlin. We did not identify the document to Mr. Carlin. We did not tell Mr. Carlin that it was a draft indictment. We did not tell Mr. Carlin that any indictment was being considered. We interviewed him, verified the accuracy of the factual matters in question and departed.

I hereby declare that the foregoing is in true and correct.

Executed on 7/29/2001

/s/ FRANK W. KORMANN
FRANK W. KORMANN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 92cv2288 (NHJ) (AK)
(consolidated with Civ. No. 93cv0324 (NHJ) (AK))

WILLIAM G. MOORE, JR., PLAINTIFF

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

DECLARATION OF PIERCE B. McINTOSH

I, Pierce B. McIntosh, declare under penalty of perjury, the following:

1. I have personal knowledge of the following facts, and, if called as a witness, could competently testify thereto.

2. I was an employee of the United States Postal Service from 1962 until my retirement in 1996. I was appointed as a Postal Inspector with the United States Postal Inspection Service on November 29, 1969, and served in that capacity until my retirement. In November 1985, I was assigned by Chief Postal Inspector Charles Clauson to work on a Task Force that had been established to investigate the procurement of optical character readers used by the Postal Service to read, code and sort letter mail.

3. My official assignment to the Task Force ended in January 1987, although I was called back to assist in the investigation by listening to tapes of Board of Governors meetings and obtaining transcripts of those

meetings. I also participated in an interview of William Spartin on August 4, 1987.

4. One question we were pursuing in the investigation was whether there had been any criminal conduct associated with the removal from office, one year after his appointment, of former Postmaster General Paul Carlin. Mr. Carlin was removed as Postmaster General in January 1986, although he continued to be employed by the Postal Service until January 1987. Mr. Carlin was interviewed on several occasions by other Postal Inspectors working on the investigation. I did not participate in any of those interviews. I did, however, deliver some documents to Mr. Carlin on June 9, 1986. At that time, Mr. Carlin was no longer the Postmaster General but was still employed by the Postal Service as Special Assistant to the Postmaster General. Mr. Carlin asked for copies of five documents that were included in a collection of documents known as the "multi-line history." The multi-line history consisted of documents that were significant to the procurement of automated mail processing equipment. It had been compiled by a member of Postal management at the direction of Mr. Carlin while he was still serving as Postmaster General. Although the history was not prepared for the purpose of assisting the investigation, we did obtain and use copies of the documents collected.

5. My notes made on June 9, 1986, at a time when Mr. Carlin's request was fresh in my mind, a true and correct copy of which is attached to my declaration as Exhibit 1, identify the documents delivered by the following numbers: 175, 200, 240, 244 and 341. I have reviewed an index to the multi-line history and those numbers correspond to the following documents listed on that index: No. 175 is a memorandum from James

Jellison to Carlin dated January 31, 1985, a true and correct copy of which is attached to this declaration as Exhibit 2; No. 200 is a memorandum by David Harris dated March 13, 1985 a true ,and correct copy of which is attached as Exhibit 3; No. 240 is memorandum from the Technology and Development Committee of the Postal Service Board of Governors to the full Board of Governors, dated May 5, 1985, a true and correct copy of which is attached as Exhibit 4; No. 244 is a memorandum from Jackie Strange to the Technology and Development Committee dated May 9, 1985 a true and correct copy of which is attached as Exhibit 5; and No. 341 is a memorandum from Mrs. Strange to Mr. Carlin dated June 14, 1985, a true and correct copy of which is attached as Exhibit 6.

6. On October 24, 1986, I was present during a meeting between Assistant United States Attorney (AUSA) Joseph Valder and William Spartin at which a copy of Spartin's nonprosecution agreement was torn into two pieces by AUSA Valder. Postal Inspectors Michael Hartman, Frank Kormann and Robert Edwards, along with Spartin's attorney, Brian Gettings, may also have attended the meeting, but my recollection is not clear on that point. I believe that Mr. Valder discussed with me and other Postal Inspectors in advance of that meeting his intention to make a show of tearing a copy of the agreement to emphasize to Mr. Spartin the necessity of his truthful cooperation with the investigation. I knew that Mr. Spartin was obligated by his nonprosecution agreement to cooperate in the investigation and to provide truthful information. As the investigation proceeded, it became apparent to me that Mr. Spartin was not honoring the terms of his agreement. Instead of providing complete information,

he was back-pedaling on information he had previously proffered and his level of cooperation was dwindling. During questioning by AUSA Valder during the October 24, 1986, interview, Spartin again appeared to be withholding information and to be providing untruthful information. At some point, Mr. Valder tore the copy of the nonprosecution agreement and said words to the effect that if Spartin did not cooperate with the government his nonprosecution agreement would be rescinded.

7. While I was working on the criminal investigation, Chief Inspector Clausen asked me to assist in preparing a report for the House of Representatives Committee on Post Office and Civil Service. The members of that Committee had requested that the Postal Service provide a comprehensive written report of the Inspection Service's findings on all non-criminal matters relating to the "Zip + 4" program, the purchase of OCRs, and the process by which the expenses of the Board of Governors were processed and audited. In accordance with Chief Inspector Clausen's direction, I assisted in the preparation of what came to be called the "Zip + 4 / Automation Investigative Report," the final version of which was provided to Congress in January 1987. I was not responsible for the first draft of any particular section of the report, but instead was involved in editing the work of other drafters and assembling the various parts of the report. The Zip + 4 / Automation Investigative Report was prepared solely for the purpose of responding to the request by the House Committee on Post Office and Civil Service for such a report.

8. On December 9, 1986, I received a telephone call from Paul Carlin. I no longer have a recollection of that

call, but I do recall that I made notes regarding the conversation at a time when it was still fresh in my mind. A true and correct copy of the notes I made is attached to this declaration as Exhibit 7. Those notes reflect that Mr. Carlin asked for the results of interviews conducted of Ms. Strange, John McKean and Albert Casey and for the results of a laboratory examination. As is explained in my memorandum for Judge George H. Revercomb, prepared on October 27, 1989, while I still had a specific recollection of my conversation with Mr. Carlin, the interviews and laboratory examination concerned the authenticity of a document purportedly authored by Mrs. Strange, specifically, a document dated March 5, 1985, entitled "Memorandum for the Record." A true and correct copy of my October 27, 1987 memorandum for Judge Revercomb is attached as Exhibit 8. The March 5, 1985, memorandum discussed an order by member of the Board of Governors Ruth Peters to freeze the program to retrofit single-line OCRS to multi-line capability. Mr. Carlin, whose actions were referred to in that document, was interviewed by the Postal Inspection Service about it, as was Mr. Casey, who had been given a copy, Mr. McKean, who was then Chairman of the Board of Governors, and Mrs. Strange herself. The concern over the document arose from a handwritten note by Mrs. Strange that appeared on one copy but not on other copies. A laboratory analysis was conducted in order to determine whether the original copy and the copy with handwritten annotations were prepared contemporaneously or if one was prepared subsequent to the other. That analysis showed that there was no evidence to support a conclusion that the documents were not prepared contemporaneously on March 5, 1985.

9. As is reflected in Exhibit 7, I did not reveal the specific content of any witness interviews to Mr. Carlin. I was not present during any of those interviews. The inquiry concerning the March 5, 1985 memorandum was not part of any grand jury investigation. Instead, it was an investigation being conducted by the Postal Inspection Service only, independent of any grand jury proceeding. I conveyed the information to Mr. Carlin because I thought that if he knew that there was no evidence of foul play with respect to the memorandum, it might expedite the disposition of a lawsuit I knew he had brought against the Postal Service arising out of his termination as Postmaster General. My recollection is that Mr. Moore was not a party to that lawsuit.

10. My purpose in taking all of the actions I did during the Task Force investigation was not to retaliate against anyone because of their protected First Amendment activity, but rather to gather all of the information I could about the events surrounding the procurement. I tried to obtain as much information as possible about the actions, statements and motives of those individuals involved in that procurement, so that it would be possible to determine whether there was probable cause to believe a crime had been or was being committed by anyone, including William Moore. However, I was not assigned to the Task Force at the time of and I did not participate in any way in the recommendation I understand was later made by the Inspection Service that the United States Attorney should seek the indictment of Mr. Moore.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ PIERCE MCINTOSH
PIERCE B. MCINTOSH

Dated: JUL 26 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 92cv2288 (NHJ) (AK)
(consolidated with No. 93cv0324 (NHJ) (AK))

WILLIAM G. MOORE, JR., PLAINTIFF

v.

MICHAEL HARTMAN, ET AL, DEFENDANTS

No. 93cv0324 (NHJ) (AK)
(consolidated)

WILLIAM G. MOORE, JR., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

UNDER SEAL

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS A GENUINE ISSUE NECESSARY FOR TRIAL

Pursuant to District of Columbia Local Civil Rule 7.1(h), Plaintiff William G. Moore, Jr. ("Moore") submits the following Response to the Defendant Postal Inspectors' Statement of Material Facts Not Genuinely in Dispute.

A. Response to Defendant Postal Inspectors' Statement of Material Facts Not Genuinely In Dispute.

1. Not contested.

2. Contested as to completeness. The Inspectors initiated an investigation into alleged threats by Peter Voss against Jackie Strange with respect to the procurement of multi-line OCRs. The Inspectors' initial interview of Jackie Strange occurred on July 25, 1985 and was purportedly prompted by remarks made by Ms. Strange on July 18 to then-Chief Postal Inspector Clauson regarding what she perceived as irregularities by members of the Board of Governors ("BOG") in the procurement process. Ms. Strange reported to the inspectors that it was her belief that Voss was operating "in a business sense and did not intend any wrongdoing." Ex. 1, SMFC4 10244-45, 7/18/85 Clauson Memorandum re: Jackie Strange interview; Ex. 2, SMFC4 10246-50, 7/25/85 Jackie Strange Interview Memorandum at SMFC4 10246.

3. Contested as to completeness. Ms. Strange eventually reported to the Inspectors that it was her belief that Voss was operating "in a business sense and did not intend any wrongdoing." Ex. 2, SMFC4 10246-50, 7/25/85 Jackie Strange Interview Memorandum at SMFC4 10246.

4. Not contested.

5. Contested as to characterization, accuracy and completeness. During the Fall of 1985, there was considerable controversy within postal management, the USPS BOG, and Congress as to whether the USPS should procure multi-line or single-line OCR equipment. Ex. 3, 003550-51, Statement by Congressman Leland; Ex. 4, SMFC1 07802-06, 4/15/85 BOG Meeting Transcript (hereinafter "Tr.") and Ex. 5, SMFC1 11838-53, 9/30/85 BOG Meeting Tr. (discussing single-line versus multi-line approach); Ex. 6, WM 004961-64, 7/09/85 Public statement of R. Peters re: Zip+4 program; Ex.

7, WM 04092-31, 7/17/85 R. Peters letter to PMG Carlin. During this time period, the UPS implemented a Phase IIA retrofit competition in which the SLOCRs that had been previously installed would be converted to MLOCRs. Ex. 8, WM 037778-79, Minutes of 7/12/85 USPS meeting re: mid-course correction. In order for REI to compete in the Phase IIA retrofit competition, REI needed information from AEG/ECA—its primary competitor who had been awarded the Phase I SLOCR contract—but AEG/ECA refused to provide such information to REI. In addition, postal service management refused to intervene on REI's behalf to collect and provide tlhe information that REI needed to complete. Ex. 9, Correspondence between REI and ECA/AEG and USPS (various Bates No. ranges). Instead, the USPS directed REI to meet with AEG in an effort to cooperatively work out the details of the information that REI needed. Ex. 10, SMFC4 10451-60, Hartman's notes of 12/23/85 interview, with William Chapp, APMG at SMFC4 10457 ("Chapp has asked French to get AEG and REI to together on technical cooperation"). During that meeting, Moore commented that if he were the Postmaster General, he would give the Phase IIA conversion program to ECA and the Phase III multi-line contract to REI. Ex. 11, SMFC4 10271-75, 11/07/85 Leopold Diecke Interview Memorandum at SMFC4 10272; Ex. 12, SMFC4 10257-60, Inspectors' translation (German English) of Kurt Scheidhauer's 10/17/85 notes of AEG/REI meeting at SMFC4 10260; Ex. 13, SMFC3 00192-210, 11/20/85 Moore Interview Memorandum (and Inspectors' notes) at SMFC4 00196-97. This is the same thing that Moore had previously told postal service management and the BOG. Ex. 14, 5-3742, Minutes of 10/09/85 meeting between postal management and Moore ("Mr. Chapp asked Moore what action he would

take if he were in the USPS position"); Ex. 15, WM 065444, 07/06/84 Moore letter to Bolger. Significantly, Governor Ruth Peters and others within the USPS had previously proposed that there be a split contract between REI and ECA for the procurement of MLOCRs and the retrofit of existing SLOCRs. Ex. 16, V4 M 01331, 10/09/85 Ray Morgan Memorandum ("R. Peters met with PC [Paul Carlin] and J. Lee on 10-8. . . . R. Peters asked if USPS can split up the OCR contracts"); Ex. 17, WM 070022-24, Statement of Technology Committee at WM 070024; Ex. 18, SMB4 01733, Moore's note: dated 3/29/86 ("Camp, Voss, Peters says [sic] they will split the business") (transcribed by Inspectors); Ex. 19, SMFC4 00202-39, Investigative Task Force's "Investigative Strategies" memo at SMFC4 00212; Ex. 20, Clauson Deposition (hereafter "Dep.") at 116-18, 123-24; Ex. 21. Edwards Dep. at 216-19. 460-61; Ex. 22, McIntosh Dep. at 260-61. Moreover, the Office of Technology Assessment had concluded in 1984 that a dual track purchase of multiline and single-line retrofits (*i.e.*, "90/10 split") was the most appropriate course of action in automating the postal service Ex. 23,002653-778, 1984 OTA Report at 002664. While Moore does not dispute that AEG Telefunken—a competitor of REI—may have purposefully twisted Moore's comments in order to fabricate a story regarding deal splitting to place a cloud of suspicion over REI, no such offer was ever made and the Inspectors were unable to establish that Moore ever made such an offer to AEG. Ex. 13, SMFC4 00192-210, 11/20/85 Moore Interview Memorandum at SFMC4 00196-98; Ex. 21, Edwards Dep. at 438, 496; Ex. 24, Hartman 5/07/98 Dep. at 160-61.

6. Not contested.

7. Contested as to accuracy and completeness. Inspectors learned that then Postmaster General Bolger had approved the purchase of single-line OCRs on July 10, 1984 and insisted that the contract be signed that same day. Ex. 25, SMFC4 10492-98, 1/07/86 Simmons Interview Memorandum at SMFC4 10492-93. The Inspectors also were aware that there was a tremendous amount of animosity between Bolger and the BOG on this issue and that, according to USPS's head contracting officer, John Simmons, Bolger wanted to "ramrod the contract through" to ECA as his last "dig" at the BOG. *Id.* Additionally, it was not the USPS's plan to wait until 1987 to implement multi-line technology. Instead, the decision of management in 1984 was to see if the volume of Zip+4 usage increased to sufficient levels to justify the use of SLOCRs, and if sufficient usage levels were not achieved, to then implement a fallback position of MLOCRs. Ex. 26, Trial Transcript (hereafter "Trial Tr.") at 2192-93. The USPS decision to purchase single-line OCRs was premised on flawed and erroneous information regarding the purported success of the Zip+4 program which was purposefully overstated by certain USPS management to discourage the shift to MLOCRs. Ex. 27, WM 001592-93, 5/09/85 Congressman Glen English letter to PMG Carlin. Members of Congress and the BOG also were expressing frustration that postal management appeared to he purposefully delaying implementation of multi-line. Ex.28, SMFC3 01201-08; WM 003965-72, 11/01/85 Memorandum from Ruth Peters to BOG. Moreover, the failure to move from single-line to multi-line technology was costing the USPS over $1 million each day in operational losses. *United States v. Recognition Equip., Inc.*, 725 F. Supp. 587, 590 (D.D.C. 1989).

8. Contested as to completeness. Postmaster General Carlin officially made his decision to move to a multi-line OCR environment on July 12, 1985, when he announced the mid-course correction. Ex. 8, WM 037778-79, Minutes of 7/12/85 Meeting re: mid-course corrections; Ex. 29, SMFC1 19097-100, 7/14/85 Memorandum from PMG Carlin to BOG. Further, Carlin promised that USPS management would "move expeditiously" to multi-line. Ex. 30, WM 038757-63, 11/19/85 Carlin letter to R. Peters at WM 038 757. The failure to implement multi-line technology was costing the USPS in excess of $1 million per day in operational losses. Ex. 31, SMFC4 10335-43, 12/03/85 Voss Memorandum Interview at SMFC4 10341; *Recognition Equip.*, 725 F. Supp. at 590.

9. Not contested.

10. Not contested.

11. Not contested.

12. Not contested.

13. Not contested.

14 Contested as to characterization and completeness. At the recommendation and direction of Assistant Postmaster General William Chapp, REI and AEG met in the Fall of 1985 to discuss the technical information that REI needed to compete in the Phase IIA retrofit conversion program. Ex. 24, Hartman 4/20/00 Dep. at 26-28; Ex. 21, Edwards Dep. at 161; Ex. 10, SMFC4 10451-60, Hartman's notes of 12/23/85 Chapp interview at SMFC4 10457; Ex. 32, SMFC3 0978 1-84, 11/19/85 Bray Interview Memorandum at SMFC3 09781-82.

15. Contested as to accuracy and completeness. During his meeting with AEG in the Fall of 1985, Moore never offered to split any contract with AEG. Instead, he commented that if he were the Postmaster General, he would give the Phase IIA conversion program to ECA and the Phase III multi-line contract to REI. Ex. 11, SWC4 10271-75, 11/07/85 Leopold Diecke Interview Memorandum at SMFC4 10272; Ex. 12, SMFC4 10257-60, Inspectors' translation (German /English) of Kurt Scheidhauer's 10/17/85 notes of AEG/REI meeting; Ex. 13, SMFC3 0015 2-210, 11/20/85 Moore Interview Memorandum at SMFC3 00196-97. This is the same thing that Moore had previously told postal service management and the BOG. Ex. 14, 5-3742, Minutes of 10/09/85 meeting between postal management and Moore; Ex. 15, WM 065444, 7/06/84 Moore letter to Bolger. Significantly, Governor Ruth Peters and others within the USPS had previously proposed that there be a split contract between REI and ECA for the procurement of MLOCRs and the retrofit of existing SLOCR's, and the Inspectors were aware that the BOG had numerous meetings where the topic of sphitting the contract was discussed and that certain BOG members favored this approach. Ex. 16, WM 01331, 10/09/85 Ray Morgan Memorandum ("R. Peters met with PC [Paul Carlin] and J. Lee on 10-8 . . . R. Peters asked if USPS can split up the OCR contracts"); Ex. 17, WM 070022-24, Statement of Technology Committee at WM 070024; Ex. 18, SMB4 01733, Moore notes dated 3/29/86 (transcribed by Inspector); Ex. 19, SMFC4 00202-39, Investigation Task Force's "Investigative a Strategies" memo at SMFC4 00212; Ex. 21, Edwards Dep. at 460-61; Ex. 22, McIntosh Dep. at 260-61; Ex. 20, Clauson Dep. at 116-18, 123-24. Moreover, the Office of Technology Assessment had

concluded in 1984 that a dual track purchase of multi-line and single-line retrofits was the most appropriate course of action in automating the postal service. Ex. 23, 002653-778, 1984 OTA Report at 002664. While Moore does not dispute that AEG Telefunken—a competitor of REI—may have purposefully twisted Moore's comments in order to fabricate a story regarding deal splitting to place a cloud of suspicion over REI, no such offer was ever made, and the Inspectors were unable to establish that Moore ever made such an offer to AEG. Ex. 13, SMFC3 00192-210 11/20/85 Moore Interview Memorandum at SMFC4 00196-97; Ex. 21, Edwards Dep. at 438, 496; Ex. 24, Hartman 5/07/98 Dep. at 160-61. Nor did Moore ever threaten to use his political clout to kill the retrofit program if AEG did not go along with his proposal. Ex. 13, SMFC3 00192-210, 11/20/85 Moore Interview Memorandum at SMFC3 00196-97. AEG, on the other hand, told the Inspectors in November 1985 that if REI "dropped out" of the competition, that AEG would offer additional licenses to make the procurement competitive. Ex. 21, Edwards Dep. at 234-35.

After the USPS directed REI and AEG to meet to discuss sharing the technical information, the Inspectors requested that the Department of Justice convene a grand jury to indict REI (and Moore) for alleged antitrust violations. However, the Inspectors' request was declined due to insufficient evidence. Ex. 33, SMFC4 00507, Inspectors' notes ("Main Justice antitrust declines request for grand jury [in November 1985]").

16. Not contested, but for completeness, the "German businessmen" who were interviewed were Scheidhauer and Diecke. Ex. 34, SMFC4 10262-69,

11/06/85 and SMFC4 10384-86, 12/06/85 Scheidhauer Interview Memoranda; Ex. 11, SMFC4 10271-75, 11/07/85 Diecke Interview Memorandum.

17. Contested. According to Inspector Edwards' memorandum to Clauson, Edwards and Hartman met with Hardy and Carver on November 8, 1985. Inspectors' Br., Ex. D at Exhibit 1. This meeting was approximately two weeks before Moore and Reedy were interviewed on November 20 1985. Moore has no knowledge or information regarding the meeting between the Inspectors, Hardy and Carver, and therefore, he has no basis to contest Defendants' assertions that such a meeting in fact occurred.

18. Moore has no knowledge or information concerning what may or may not have been said during the meeting between the Inspectors, Hardy and Carver, and therefore, Moore has no basis to contest the assertions as to what transpired during any such meeting.

19. Moore was no knowledge or information concerning what may or may not have been said during the meeting between the Inspectors, Hardy and Carver, and therefore, Moore has no basis to contest the assertions as to what transpired during any such meeting.

20. Moore was no knowledge or information concerning what may or may not have been said during the meeting between the Inspectors, Hardy and Carver, and therefore, Moore has no basis to contest he assertions as to what transpired during any such meeting.

21. Not contested.

22. Contested. While the memorandum indicates in very general terms the proposed direction of further investigation by the Inspectors, it does not outline the nature and scope of the investigation that subsequently followed, which was far more expansive in nature and scope and included probe into Moore's constitutionally protected communications with members of Congress and the media, as well as political fundraising activities. *See, e.g.*, Ex. 19, SMFC4 00202-39, Investigative Task Force's "Investigative Strategies" memo at SMFC4 00216, 00233, and 00235; Ex. 35, SMFC4 00004-147, "Details of Offense;" Ex. 36, SMFC3 09861-64. "Arguments for Indicting the Corporation."

23. Contested as to accuracy and completeness. Moore does not contest that the Inspectors learned that Voss was engaged in a travel voucher scheme that defrauded the government of over $44,000, but there was no evidence that Moore was aware of or participated in any such scheme. Moreover, the grand jury investigation revealed that the check payments that were made from Gnau to Voss were actually made to "Decision Systems, Inc."—and not to Voss personally —in an effort to keep the payments secret and not reveal that they were actually kickbacks to Voss for various work that was referred to Gnau. *Recognition Equip.*, 725 F. Supp. at 590; Ex. 26, Trial Tr. at 621-22, 844-47; Ex. 37, USA-001-0010-12, 4/15/84 Agreement between Gnau and Decision Systems, Inc.; Ex. 38, 2-5688-89, 9/84 Memo from Decision Systems, Inc. to Gnau; Ex. 39, DOJ23 001681-702 and DOJ29 000469-490, Grand Jury "Statement of John R. Gnau, Jr." (hereafter "Gnau Statement") at DOJ23 001684. Additionally, none of the conspirators involved in the kickback scheme ever told Moore or anyone else at REI that any

payments (either in the form of cash, checks, or airline tickets) were being made to Voss, and Moore never had any knowledge of any such payments. Ex. 40, William Moore Affidavit (hereafter "Aff."). ¶ 23; Ex. 21, Edwards Dep. at 119-20, 526; Ex. 24, Hartman 5/07/98 Dep. at 132, 134-36, 249; Ex. 41, Kormann Dep. at 132-36, 507-08, 576, 580; 590-607; Ex. 22, McIntosh Dep. at 185-86.

24. Not contested.

25. Contested as to accuracy and completeness. Moore does not dispute that the Inspectors learned during their investigation that Gnau was paying, kickbacks of money to Voss for business referrals, including the referral of REI to Gnau. Nor does Moore dispute that the Inspectors learned that Spartin was bribing Voss with airline tickets and that Voss assisted Spartin in obtaining a recruiting contract to search for a new postmaster general to replace Paul Carlin. However, the investigation revealed that the payments that were made from Gnau to Voss were actually made to "Decision Systems, Inc." In an effort to keep the payments secret and conceal that they were actually kickbacks to Voss for various work that was referred to Gnau. *Recognition Equip.*, 725 F. Supp. at 590; Ex. 26, Trial Tr. at 621-22, 844-47; Ex. 37, USA-001 0010-12, 4/15184 Agreement between Gnau and Decision Systems, Etc., Ex. 39, DOJ23 001681 702, Gnau Statement at DOJ2 3 001684. Moreover, none of the conspirators involved in the kickback scheme ever told Moore or anyone else at REI that any payments (either in the form of cash, checks, or airline tickets) were being made to Voss, and Moore never had any knowledge of any such payments. Ex. 40; Moore Aff. ¶ 23; Ex. 21, Edwards Dep. at. 119-20, 526; Ex. 24, Bartman 5/07/98 Dep. at 132, 34-36, 249;

Ex. 41, Kormann Dep. at 132-36, 507-08, 576, 580; 590-607; Ex. 22, McIntosh Dep. at 185-86. In fact, not only did the contract between REI and GAI forbid any illegal activity on the part of GAI, but when Moore confronted Gnau after Voss pled guilty in the Spring of 1986i, Gnau repeatedly denied that he was involved in any wrongdoing and/or that any payments had been made to Voss. Ex. 42, DIOJ38 00039-43, USA 028-0036-40, 2/85 REI/GAI Consulting Agreement at X10; Ex. 35, SMFC4 00004-147, "Details of Offense" at SMFC4 000123 ("Gnau replied that he loaned Voss money due to Voss' financial problems resulting from Voss' divorce"); Ex. 43, SMFC4 09889-910, 5/09/86 Voss Interview Memorandum at SMFC4 09910. With respect to Spartin's conduct, there was no evidence developed during the investigation that Moore was aware of or participated in Spartin's airline Picket scheme with Voss. In this regard, Spartin even concealed from Marcus that he was paying Voss in airline tickets. Ex. 44, SMFC4 0974-97, 8/5-6/86 Marcus Interview Memorandum at SMFC4 10981, ¶ 2. Moreover, Spartin's executive recruiting contracts for the USPS received approval by the Board of Governors, including BOG Chairman John McKean. *Recognition Equip.*, 725 F. Supp. at 590; Ex. 45, SMFC4 10524-35, 3/18/86 John McKean Interview Memorandum at SMFC4 10526; Ex. 46, SMFC4 10735-38, 5/06/86 McKean Interview Memorandum at SMFC4 10737.

26. Contested as to completeness. During their investigation, the Inspectors were told by Voss that the dinner with Reedy was Voss's suggestion in order to apologize for the fact that the BOG Technology Committee had canceled at the last minute its scheduled visit to Dallas to tour REI's facility. Ex. 47, DOJ4

001389-1400, 3/09-11/88 Voss Interview Memorandum at DOJ4 0001390; Ex. 48, 2-5499, 8/20/84 Reedy letter to Voss. During the meeting, Voss told Reedy that he believed REI had a good product and that, in the interests of the USPS, he wished that REI would retain someone to aid them in packaging and presenting their product to the USPS. *Recognition Equip.*, 725 F. Supp. at 590.

27. Contested as to completeness. During their investigation, the Inspectors were told by Voss that, in response to Reedy's question to Voss about how REI could most effectively make a presentation to the BOG, Voss told Reedy that he (Voss) was capable of making the proper presentation, but could not do so because he was a member of the BOG. Voss also told the Inspectors that he informed Reedy during this same dinner that "[he] felt it would be inappropriate to make such a presentation on behalf of a vendor." According to Voss, Reedy also told Voss that REI was represented by Hill & Knowlton, to which Voss replied that REI needed someone "lower key and less emotional." Although Voss was hesitant to provide Reedy with names of any particular consultant, Voss told the inspectors that he suggested three different entities: GAI , Grey & Company and Nofziger-Bragg, Inc. It was only after Reedy pressed Voss that he indicated GAI. Despite this recommendation, however, REI did not actually retain GAI until many months later, principally because REI saw no need to rush into a new consulting relationship when the political climate at the USPS was uncertain and a new PMG was coming into office in January 1985. *Recognition Equip.*, 725 F. Supp. at 590-91; Ex. 47, DOJ4 001389-400, 3/9-11/88 Voss Interview Memorandum at DOJ4 001390-91; Ex. 49, Moore Dep. at 210-

11; Ex. 41, Kormann Dep. at 789-90, 795-96; Ex. 50, SMFC3 00236-50, 7125/86 Reedy Interview Memorandum at SMFC3 00239-40; Ex. 26, Trial Tr. at 1185, 1618-19. See also infra ¶¶ l 15-132, which are incorporated by reference herein as if set forth in full.

28. Not contested. By way of further response, Moore incorporates by reference Paragraphs 115-132, *infra*, as if set forth in full.

29. Contested as to completeness and context. By way of response, Moore incorporates by reference his response to Paragraph 25 as if set forth in full. Moore further incorporates by reference Paragraphs 133-36, *infra*, as if set forth in full.

30. Contested as to completeness and context. The Inspectors were aware that the reason Reedy told them that he learned of Gnau through Bob John Robison was that both Reedy and Tom Loose, REI's general counsel, were suspicious of the Inspectors' motives for requesting information from REI. *Recognition Equip.*, 725 F. Supp. at 595; Ex. 51, SMFC3 00226-29, 4/08/86 Reedy and Loose Interview Memorandum at SMFC3 00228-29. The Inspectors knew that Reedy and Loose were suspicious because (1) on a prior occasion in 1979 the inspection service had frustrated REI's ability to compete in a procurement where it had subpoenaed REI's records and then later returned the records without comment or action; and (2) Inspector Edwards had earlier in the day engaged in a "heavy-handed" treatment of Frank Bray by raising his voice and telling Bray, among other things, that people would be going to jail and that Bray should "get on the bus" before it left the station. Ex. 26, Trial Tr. at 3346, 3348-53, 3363; Ex. 51, SMFC3 00226-29, 04/08/86 Reedy/Loose Interview Memorandum at SMFC3 00222, 00226, 00228-29.

In fact, Inspector Edwards understood that Reedy and Loose were charging that "this current investigation was . . . a contrivance to set up because REI was on the verge of delivering a machine out in Phoenix to be tested. . . . So there was a feeling that we were there, in some way to preclude REI from competing." *Id.* at 00229; Ex. 26, Trial Tr. at 3352, 3364-65. Moreover, Inspector Harrington, who was second in command at the Inspection Service with 32 years of experience, knew that Edwards' conduct in interviewing Bray was inappropriate and unsuitable. Ex. 26, Trial Tr. at 3446, 3467. By way of further response, Moore incorporates by reference Paragraphs 183-86, *infra*, as if set forth in full.

31. Contested as to completeness and context. Moore does not dispute that Spartin's scripted grand jury statement contains a notation that Reedy allegedly contacted Spartin's office on or about April 8, 1986. There is no indication, however, that Reedy ever spoke to Spartin during any such call. Moreover, Spartin admitted to the Inspectors during the investigation that neither Moore, Reedy nor anyone else at REI ever agreed with Spartin to hide or conceal any facts or information from the Inspectors. Ex. 52, 00223-75, Spartin Polygraph at 00251; Ex. 26, Trial Tr. at 2626-27. By way of further response, Moore incorporates by reference his response to Paragraph 59, *infra*, as if set forth in full.

32. Contested as to context. The Inspectors actually learned this fact from Reedy. In fact, Reedy apologized to the Inspectors and told them during their next interview that he (Reedy) had obtained Gnau's name from Voss. Ex. 26, Trial Tr. at 3366; *Recognition Equip.*, 725 F. Supp. at 595; Ex. 50, SMFC3 00236-50,

7/25/86 Reedy interview Memorandum at SMFC3 00249.

33. Contested as to completeness and context. Reedy actually apologized to the Inspectors and told them during their next interview that he (Reedy) had obtained Gnau's name from Voss. Ex. 26, Tr al Tr. at 3366; *Recognition Equip.*, 725 F. Supp. at 595; Ex. 50, SMFC3 00236-50, 7/25/86 Reedy Interview Memorandum at SMFC3 00249.

34. Contested as to completeness and context. In or about November 1984, several months after Voss had recommended GAI to Reedy, Voss called Moore to encourage REI to stay in the competition for a USPS contract, to inform Moore that he had given Reedy the name of a consultant that could help REI, and to say that he hoped Reedy would follow up on his recommendation. Ex. 49, Moore Dep. at 212-14; Ex. 53, SMFC4 10897-915, 7/25/86 Moore Interview Memorandum at SMFC4 10901; Ex. 54, 005681-82, 12/20/84 Note from Moore to Voss. By way of further response, Moore incorporates by reference Paragraphs 115-132, *infra*, as if set forth in full.

35. Contested as to completeness and context. After his call with Voss in or about November 1984, Moore spoke with Reedy and urged him not to "drop the ball" and to follow up on Voss' recommendation. Ex. 41, Moore Dep. at 212-14; Ex. 53, SMFC4 10897-915, 7/25/86 Moore Interview Memorandum at SMFC4 10901. "Reedy was a strong executive in many ways, but he wasn't a particularly good administrative guy on occasion. So [Moore] said, 'Look, no matter where we are going with Postal, here's the guy whose the vice-chairman of the board, he has given you a name, you said you would follow up, I expect you to do that. . . .

Give the man the courtesy of following up as you said you would.'" Ex. 41, Moore Dep. at 214. REI, however, was not concerned about moving too quickly to hire any additional consultants in light of the then-existing political climate in Washington and the appointment of Paul Carlin as the new postmaster general effective as of January 1985. *Recognition Equip.*, 725 F. Supp. at 591; Ex. 26, Trial Tr. at 1185, 1618-19; Ex. 50, SMFC3 00236-50, 7/25/86 Reedy Interview Memorandum at SMFC3 00240.

36. Contested as to characterization, completeness and materiality. More than 16 of the referenced call lasted approximately two minutes or less, and there is no indication as to whether Voss actually spoke to anyone at REI during those calls or whether the calls were simply secretarial message-taking exchanges. Ex. 35, SMFC4 00004-147, "Details of Offense" at SMFC4 00034, 36-37, 39, 42-43. In addition, for all but a couple of the calls, there was no evidence developed during the investigation as to who spoke to who, what the content of any such conversations may have been, or how long a person may have been on hold before actually talking to another person during any of the referenced conversations.

37. Contested. Nothing in the Inspectors' interview notes with Peterson indicates that she told the Inspectors that Voss made five to ten follow-up telephone calls relating to REI's hiring of GAI. Ex. 55, SMFC3 10120-31, Grand Jury "Statement of Sharon Peterson" (hereafter "Peterson Statement") (summary of Peterson's statements to Inspectors on 5/15, 9/03, and 9/11/86 interviews); Ex. 56, SMFC3 06614-30, 9/19/86 Grand Jury Tr. (Peterson testimony). In addition, there was no evidence that Voss had any recollec-

tion of making such calls, and there was no evidence developed during the investigation as to who spoke to who, when the conversations may have occurred, or what the content or context of any such conversations may have been.

Similarly without merit is the contention in Paragraph 28 of Hartman's affidavit concerning statements allegedly made by Voss during a supposed telephone conversation with Moore in July 1984. During her testimony at trial, Peterson specifically admitted that, while her handwriting is contained on the letter, she had no recollection of the circumstances under which the notes were made or what the notes related to. Ex. 26, Trial Tr. at 834-37.

38. Not contested.

39. Contested as to completeness. REI retained GAI after several months of negotiating the terms of a consulting services agreement. Ex. 49, Moore Dep. at 211-12. In fact, the agreement itself was not finalized until nearly six months after Gnau was initially referred to REI. *Recognition Equip.*, 725 F. Supp. at 590. The Inspectors obtained a copy of the executed agreement during their investigation. Ex. 42, DOJ38 000039-43, USA-028-0036-40, 2/85 REI/GAI consulting agreement. By way of further response, Moore incorporates by reference Paragraphs 115-132, *infra*, as is set forth in full.

40. Contested. The Inspectors were aware from their review of the telephone records that there were several telephone calls purportedly placed between REI and Voss's office after January 1985. See, e.g., Ex. 35, SMFC4 00004-147, "Details of the Offense" at SFMC4 00058, 89, 91. Moreover, given the lack of

evidence developed during the investigation as to what substantive communications may have transpired between REI and Voss either before or after January 1985, there is "no rational basis to reach an inference of any type on the meaning of the [alleged] cessation of contact between Voss and Moore." *Recognition Equip.*, 725 F. Supp. at 594, n.4.

41. Contested as to completeness and accuracy. Moore does not contest the fact that one of the pages in his postal notebook has a notation "Closed Session." See Inspectors' Br., Ex. B at Exhibit 1 (at 005600). There is no indication in the notes, however, from whom the information was received, nor is there any rational basis to conclude that Moore had improperly received any information concerning a closed BOG meeting. Moreover, the Inspectors learned that Moore received BOGC documents and information concerning the procurement process from Congressman Martin Frost's staff member Bonnie Catone, as well as from Congressman English's office. Ex. 57, DOJ47 000604-51, BOG excerpts provided by Bonnie Catone to Moore (with Catone's handwritten note "Bill—Here's the confidential information I discussed wiith you—Bonnie") (excerpts from 3/08/83 open BOG meeting); Ex. 35, SMFC4 00004-147, "Details of Offense" at SMFC4 00006; Ex. 58, USA-015-0252-57, Hartman's notes of 2/09/87 interview of Bonnie Catone at USA-01-0249 and 0255; Ex. 59, USA-015-0258-62, Kormann's notes of 2/09/87 interview with Bonnie Catone at USA-015-0261; Ex. 60, SMFC3 02126-32, Inspectors' Flip Chart at SMFC3 0212'; Ex. 61, SMFC4 07511-15, 5/12/87 Letter from Clauson to Edward Gleiman. There is no evidence that either Moore or anyone else at REI received any BOG documents or information directly from Voss.

Indeed, Voss told the Inspectors that he had provided no information directly to Moore or REI and that he had no knowledge that Marcus gave USPS materials received from Voss or Peterson directly to REI. Ex. 47, DOJ 0013891400, 3/9-11/88 Voss Interview Memorandum at DOJ 001394. Additionally, the Inspectors learned during their investigation that ECA, REI's chief rival, was also receiving inside information relating to, among other things, closed BOG meetings from John Simmons USPS contracting officer—as well as from ECA's own consultants (Nofzinger & Bragg). Ex. 26, Trial Tr. at 2295-321; Ex. 62, SMFC4 02288,11/13/89 Memorandum from BOG Secretary Harris to Clauson regarding "ECA Mole". In this regard, ECA had refused during the investigation to disclose the name of its consultant that was feeding ECA with USPS information, but the Inspector took no action against ECA for its refusal to provide this information. Ex. 26, Trial Tr. it 2299-301.

42. Contested as to completeness and context. While Moore does not contest that his notes dated April 29, 1985 reflect the notation "Consultant-wired (Peter Voss)," the inspectors never asked what these notes meant during their investigation. Ex. 40, Moore Aff. ¶ 27. Moore's use of the term "wired" simply meant that REI's consultant, Gnau, was politically well-connected to the Reagan Administration and was a political acquaintance of Voss. *Id.* ¶ 28; Ex. 49, Moore Dep. at 301. Furthermore, the Inspectors understood that this term was not synonymous with "bribery" and, thus, did not suggest that Moore knew that Voss was on the take. Ex. 41, Kormann Dep. at 302-03; Ex. 63, 2-61-86, Hartman's notes of 1994 speech at 2-79 ("Just because consultant is wired doesn't mean there is bribery."); Ex.

64, 2-46-59, Notes of Hartman Speech at 2-56 ("REI well insulated by consultants—consultant wired but not necessarily bribed.").

43. Not contested, except that the Inspectors actually learned that REI and Moore had begun earlier than 1985 to aggressively lobby many members of Congress and the postal service to win a sole source contract for the production of MLOCR's. Ex. 65, Examples of letters to and from Congressmen from 1983 to 1986 (hereafter "Congressional letters") (various Bates No. ranges); Ex. 66, SMFC3 08900, 08/24/83 Moore letter to Bolger; Ex. 15, WM 065444, 7/06/84 Moore letter to Bolger; Ex. 67, WM004798-99, 7/02/84 Moore letter to BOG; Ex. 67 Trial Tr. at 1597-98. This effort included, among other things, working closely with Congressman Martin Frost in 1985 to enact legislation known as the "Frost Amendment" (a/k/a Buy-America Amendment), which would have required the USPS to purchase equipment from an American company, rather than a company whose technology was owned by foreign interests. Ex. 40, Moore Aff at ¶ 21; Ex. 68, 003552-3, Copy of H.R. 3036 ("Frost Amendment").

44. Contested. The Inspectors actually learned that REI and Moore had begun much earlier than 1985 to aggressively lobby many members of Congress, the media, and the postal service to win a sole source contract for the production of MLOCRs. Ex. 65, Congressional letters (various Bates No. ranges); Ex. 15, WM 065444, 7/06/84 Moore letter to Bolger; Ex. 67, WM004 798-99, 7/02/84 Moore letter to BOG; Ex.. 26, Trial Tr. at 1597-98; Ex. 40, Moore Aff. at ¶ 21. By way of further response, Moore incorporates by reference Paragraphs 98-107, *infra*, as if set forth in full.

45. Contested. Neither the Inspectors' notes of their interviews with Marcus nor Marcus' grand jury statement reflect that Moore allegedly made any such statement. Ex. 69, SMFC3 10034-57, Marcus Grand Jury Summary at SMFC3 10048. In fact, the Inspectors' handwritten notes reflect that this comment was purportedly made by Reedy over the telephone to Marcus. Ex. 70, Inspectors' notes of 8/06/86 Marcus Interview at WM 007129 (McIntosh) ("Robert Reedy said why didn't you get Voss to order a sole source") and WM 007110 (Hartman) ("Reedy was very unhappy —why don't you get Voss to order sole source"). The notes do not reflect that Moore was ever present when the alleged comment was supposedly made by Reedy. *Id.*; Ex. 44, SMFC4 10974-97, 8/5-6/86 Marcus Interview Memorandum at SMFC4 10988; Ex. 60, SMFC3 02126-32, Inspectors' Flip Chart at SFMC3 02130. Furthermore, Marcus specifically testified at trial that his supposed discussion about getting Voss "to order sole source" was with either Bray or Reedy, but he does not recall who said what or what was actually said and that his grand jury "statement" did not refresh his recollection on this point. Ex. 26, Trial Tr. at 2000-2018. Significantly, Judge Revercomb questioned the reliability of Marcus's scripted "statement" and refused to allow it to be used as evidence of what Marcus allegedly discussed with Reedy and Bray. *Id.*

46. Contested to the extent that it purports to infer that Reedy and Bray were told that Marcus obtained information from Voss. The Inspectors developed no evidence during their investigation that showed that Reedy and Bray were told that Marcus obtained information from Voss. In fact, Marcus specifically testified that he did not tell Bray or Reedy that

documents were received from Voss. Ex. 26, Trial Tr. at 1988-89. Moreover, Voss specifically told the Inspectors during the investigation that he did not provide any information directly to anyone at REI. Ex. 47, DOJ 01389-1401, 03/9-11/88 Voss Interview Memorandum at DOJ 001394.

47. Contested as to completeness. Marcus also provided similar documents to Ruth Peters of the BOG, who used the information as her own. Furthermore, BOG member George Camp, who supported he MLOCR approach, also knew that Marcus was providing information to Peters and Voss and complimented Marcus on his work. Similarly, Gerald Rosberg, the BOG attorney, and Louis Cox, USPS General Counsel, were also aware that BOG members were using materials supportive of REI prepared by Marcus. Ex. 71, WM 004821-28, 3/25/85 Confidential Memorandum from Marcus to Peters; Ex. 72, SMFC4 00831, 1985 Kormann's notes regarding Camp's knowledge of Marcus' documents ("Camp knew Michael Marcus was writing memos. How?—Camp complimented Michael Marcus on his memos"); Ex. 41, Kormann Dep. at 358-59, 389, 818; Ex. 73, SMFC4 J 0412-19, 12/11/85 Louis Cox Interview Memorandum at SMFC4 10417 ("it appeared RE] has written some of the material presented by Governor Peters"); Ex. 74, SMFC4 10716-32, 5/01/86 Gerald Rosberg Interview Memorandum at SMFC4 10724 ("he believed Governor Peters received correspondence from Michael Marcus"). Moreover, there were management personnel at USPS who did not view it as being a conflict of interest for REI to have prepared materials for members of the BOG. Ex. 75, USA-001-144-49, Hartman's notes of James French Interview Memorandum at USA-001-147 ("not aware of

any conflict"); Ex. 22, McIntosh Dep. at 244-45. Finally, there was no evidence developed during the investigation that Moore or anyone at REI was aware that Voss was passing off Marcus' work product as his own within the USPS.

48. Contested. There is no evidence that Moore was ever aware of the statements allegedly mac a between Gnau and Reedy. In this respect, Inspectors Hartman and Kormann acknowledged during their depositions that Reedy's conduct and statements cannot be imputed to Moore without some evidence that Moore was aware of them. Ex. 41, Kormann Dep. at 148-49; Ex. 24, Hartman 4/20/00 Dep. at 212.

With respect to the October 12, 1984 Admiral's Club meeting between Reedy and Gnau, the Inspectors' notes of their interview with Gnau on Septernber 23, 1986 do not reflect any conversation about "our friend" having occurred; instead, the notes indicate that Gnau described the meeting to the Inspectors as one where there was a general discussion between Gnau and Reedy, the two established a rapport with one another, and they weighed each other's body chemistry. Ex. 76, USA-015-0352-97, Inspectors' notes of 9/23/86 Gnau interview at 0359 (Kormann) and 0380 (Hartman). Moreover, both REI and GAI referred to Voss by name (instead of "our friend") after the meeting between Gnau and Reedy, and no one ever told Frank Bray or anyone else at REI not to refer to Voss by name. Ex. 26, Trial Tr. at 1621, 1980-81, 2411, 2636; *Recognition Equip.*, 725 F. Supp. at 593.

With respect to Reedy's alleged statement that "I know you have people to take care of," Gnau admitted tha he could not recall the context in which this statement was made, nor could he recall the lead-

up statement that led to Reedy's alleged remarks. Ex. 26, Trial Tr. at 604-05. Moreover, Gnau testified that when an increase in GAI's monthly retainer was requested, Reedy indicated that there were "a lot of people to take care of in regard to the various things" that were laid out in a strategy memo that GAI had put together as part of REI's procurement efforts. Ex. 26 Trial Tr. at 455. Similarly, the Inspectors learned during their investigation that Reedy's alleged comment was made in response to GAI's need to hire additional personnel to work on the REI account. Ex. 22, McIntosh Dep. at 362-69, 375; Ex. 77, WM 007030-137, Inspectors notes of 8/05/06/86 Marcus interview at 007112 (Hartman) and 007130 (McIntosh).

With respect to Reedy's alleged statement to Gnau concerning "what's your arrangement with Peter Voss," Gnau admitted that he could not recall the context in which this statement was made, nor could he recall the lead-up statement that led to Reedy's alleged remarks. Ex. 26, Trial Tr. at 404-05. Instead, Gnau conceded that "I have tried for many, many months and a long time to put that in its proper perspective, but I will go on record to tell you that I never told Mr. Reedy tha Mr. Voss was on the payroll or that I was compensating him in any way." *Id.* at 405, 557. In fact, when Reedy asked Gnau directly in the Spring of 1986 if he had made any payments to anyone, Gnau answered "absolutely not" and explained that he had simply loaned Voss some money because Voss was having financial problems in connection with his divorce. *Id.* at 561.

49. Contested. According to the scripted statement that the Inspectors prepared and that Valder read to the grand jury, Bray told the Inspectors

that "Moore developed a marketing strategy that Moore believed would support Governor Sullivan's recommendation to award a sole-source contract to AEG/ECA for Phase 11-A and result in a sole-source award to REI for Phase III." Ex. 78, SMFC3 01414-1526,7/16/87 Bray Grand Jury Tr. at SMFC3 01484. Additionally, the BOG and REI had both expressed concern to USPS management in late 1985 and early 1986 that AEG s refusal to release proprietary technical information to REI for the Phase IIA retrofit program amounted to a *de facto* sole source contract to ECA. Even some of the personnel within the USPS and the BOG reconize that without AEG's technical data, REI would be unable to complete in the Phase IIA retrofit progam. Ex. 79, WM 004887, 10/10/85 BOG Letter to Carlin; Ex 49, Moore Dep. at 240-41; Ex. 80, WM 005524-26, 1/28/86 Letter from Reedy to Simmons; Ex. 81, WM 000767-71, 1/16/86 Internal USPS Memorandum; Ex. 28, WM 003965-72, 11/C 1/85 R. Peters memo at 003965 ("the unwillingness of one vendor [AEG] to release allegedly proprietary information has made . . . a de facto sole source procurement"); Ex. 21, Edwards Dep. at 166.

50. Contested. REI requested the necessary technical information from AEG that REI needed to develop a retrofit kit in the most timely and inexpensive way possible. Ex. 49, Moore Dep. at 240-41; See Ex. 9, Correspondence between REI and AEG, e.g., WM 064806, 11/18/85 Letter from Reedy to Scheidhauer and WM 036018-20, 1/28/86 Letter from Reedy to John Simmons. According to the Inspectors' notes of their interviews with Bray, Bray told them that he prepared a list of technical data needed from AEG and "asked for more than he expected to get, expected to negotiate

with AEG." Ex. 82, WM 016250-64, Kormann notes of 6/10/86 Bray interview at WM 016258. Bray also told the Inspectors that "Moore believed that REI could not retrofit without documentation." Ex. 83, WM 016376-86, 07/14/87 Hartman notes of Bray interview at WM 016376. Additionally, Bray told the Inspectors that he "was not instructed to make [AEG] say no—was instructed to ask for everything. We didn't know what we needed." Ex. 84, SMFC3 01952-70, Hartman notes of Bray interview at WM 016360.

51. Contested. Defendants have offered no factual support for this statement. Nor have they identified the "information" from Bray that allegedly led them to doubt REI's good faith participation in the Phase IIA procurement.

52. Not contested. By way of further response, Moore also told the Inspectors that Spartin was more of a name dropper than anything else. Inspector's Br., Ex. B & Exhibit 5 thereto at 11. The record also shows that Spartin was more interested in selling his recruiting services to REI than actually working on any postal-related work. Ex. 26., Trial Tr. at 2641-42; Ex. 85, WM 005627-69, Spartin letters to REI. Moore did not even meet Spartin until the end of March 1985, at which time Spartin focused on his MSL recruiting activities because he "wanted recruiting assignments from REI." Ex. 26, Trial Tr. at 2410-11. Moreover, the investigation showed that Spartin was busy throughout 1985 with his recruiting activities and that there was no telephone or other contact between Moore and Spartin prior to December 1985. Ex. 35, SMFC4 00004-147, "Details of Offense"; Ex. 26, Trial Tr. at 2682-85.

53. Not contested.

54. Not contested. By way of further response, Moore incorporates by reference Paragraph 109, *infra* as if set forth in full.

55. Not contested. By way of further response, Moore incorporates by reference Paragraphs 137-52, *infra*, as if set forth in full.

56. Contested as to completeness and context. In or about mid-December 1985, Moore provided Spartin with the names of three preeminent American businessmen: John Lawrence, a former Chairman of REI; Chester Nimitz, former Admiral of the United States Navy and Chairman of the Board and CEO of Perkin-Elmer Corporation; and Albert Casey, former Chairman and CEO of Times Mirror Corporation and Chairman of American Airlines. Ex. 26, Trial Tr. at 737, 1511, 2705, 3090; Ex. 52, Spartin Polggraph at 00249; Ex. 49, Moore Dep. at 250, 256-59; *Recognition Equip.*, 725 F. Supp. at 600. Moore did not, however, recommend any particular candidate over another. Ex. 22, McIntosh Dep. at 322. Nor did he have any role whatsoever in the appointment of Casey as the new postmaster general or the removal of PMG Carlin. On the contrary, the BOG met on December 2, 1985 to discuss their dissatisfaction with Carlin's performance and unanimously voted on January 6, 1986 to remove Carlin and replace him with Albert Casey. Ex. 26, Trial Tr. at 2473, 2926-33, 2979-80, 2988, 2991; *Recognition Equip.*, 725 F. Supp. at 599. In addition, the Inspectors were aware from their investigation that Carlin "did a terrible job" and was viewed as "indecisive and not a good PMG" by senior USPS management and the BOG. Ex. 35, SMFC4 00004-147, "Details of Offense" at SMFC4 00138; Ex. 86, Jellison Dep. at 172-73; Ex. 24, Hartman 4/20/00 Dep. at 150; Ex. 41, Kormann Dep. at

772-73, 370-71. By way of further response, Moore incorporates by reference Paragraphs 137-52, *infra*, as if set forth in full.

57. Contested. The record does not reflect that Casey's appointment caused speculation regarding corruption relating to REI's efforts to obtain an OCR contract. Rather, the speculation was only whether Casey's appointment would improve REI's chances for a USPS contract. See Inspectors' Br., Ex. B ¶ 36 & Exs. 8 and 9. By way of further response, Moore incorporates by reference Paragraphs 147-52, *infra*, as if set forth in full.

58. Contested. Moore does not contest that he at first did not believe that Spartin was recruiting for a new postmaster general to replace Carlin. Moore does contest, however, that his explanation of his contact with Spartin should have raised any question about Moore's candor. The record shows that Spartin was more interested in selling his recruiting services to REI than actually working on any postal-related work. Ex. 26, Trial Tr. at 2641-42.; Ex. 85, WM 005627-69, Spartin letters to REI. Moore did not even meet Spartin until the end of March 1985 at which time Spartin focused on his MSL recruiting activities because he "wanted recruiting assignments from REI." Ex. 26, Trial Tr. at 2410-11. Moreover, the investigation showed that Spartin was busy throughout 1985 with his recruiting activities and that there was no telephone or other contact betwveen Moore and Spartin prior to December 1985. Ex. 35, SMFC4 00004-147, "Details of Offense"; Ex. 26, Trial Tr. at 2682-85.

59. Contested. Spartin admitted to the Inspectors during their investigation that Moore would not go along with Spartin's attempt to cover-up his

(Spartin's) activities by saying that Moore had called Spartin recommending candidates for postmaster general. Indeed, Spartin told the Inspectors that when he talked to Moore about this issue, Moore said "you called me, I responded to your inquiry, those are the facts, nothing else to talk about." Ex. 87, WM 009065-67, Hartman notes of 6/23/86 Spartin interview at 9066; Ex. 88, WM 009068-69, McIntosh notes of 06/23/86 Spartin interview at 9068; Ex. 24, Hartman 04/20/00 Dep. at 41-45; 48-50; Ex. 22, McIntosh Dep. at 329-330; Ex. 52, Spartin Polygraph at 00251. Moreover, Spartin admitted during his polygraph examination that neither Moore nor anyone else at REI had agreed to participate in any of Spartin's efforts to hide his own conduct. Ex. 52, Spartin Polygraph at 00251; Ex. 26, Trial Tr. at 2626-27.

60. Contested. When Moore and Reedy had lunch with Gnau at the Maison Blanche in Washington, D.C. on April 14, 1986, Moore said that their attorneys were concerned about the meeting because of the ongoing investigation, but that he and Reedy were not doing anything wrong and simply wanted to know what had really been happening between Voss, Gnau and Spartin. Moore told Gnau that he was very concerned about Spartin trying to involve him in some kind of effort to change facts. Ex. 26, Trial Tr. at 547-48, 550-53; *Recognition Equip.*, 725 F. Supp. at 501. Moore and Reedy also asked Gnau at the April 14 meeting what Gnau's role had been in the matter, to which Gnua purportedly "told them that I didn't think it was in my interest or their interest for me to discuss what had happened and just better that they didn't know." Ex. 26, Trial Tr. at 547. Gnau never told either Moore or

Reedy that he had made any payments to Voss. *Id.* at 557, 582-83.

A month later in May 1986, Moore again told Gnau while attending a reception on the White House lawn that he was concerned that Spartin was trying to involve Moore in some type of cover up. Gnau did not have the impression, however, that Moore participated in a cover up, but only that Spartin was attempting to involve Moore in such activities. Ex. 26, Trial Tr. at 553; *Recognition Equip.*, 725 F. Supp. at 601. Gnau never told the Inspectors that Moore said he had agreed upon a cover-up with Spartin, and Defendants cite no record support for such an assertion.

61. Contested. The Inspectors had no proof or verification that Moore, Reedy, Gnau and Voss had supposedly met and allegedly developed a story to cover-up their alleged involvement with one another. Moore and Reedy, in fact, had never attended any such meeting, nor had they agreed with Gnau and Voss on any cover-up. Ex. 40, Moore Aff. at ¶ 29. Similarly, neither Gnau nor Voss ever told the Inspectors that any such meeting had ever occurred or that Moore and Reedy had agreed to any cover-up. Spartin likewise told the Inspectors that neither Moore nor anyone else at REI had agreed to participate in any of Spartin's efforts to hide his own conduct. Ex. 52, Spartin Polygraph at 00251; Ex. 26, Trial Tr. at 2626-27.

62. Contested as to completeness. REI made a good faith search for the referenced records and was simply unable to locate them. Ex. 89, DOJ23 002271-84, 6/04/87 Grand Jury Tr. at DOJ23 0(2273-84 (Carol Lyon testimony); Ex. 90, SMFC3 09187-88, 5/29/86 Lyon affidavit. REI initially was unable to locate printed copies of the subpoenaed toll records. Ex. 89, Lyon's

6/04/87 Grand Jury testimony at DOJ23 002271. After Inspector Hartman called REI to request the whereabouts of the missing records, REI obtained backup copies of some of the records by reprinting the phone records from backup computer tapes. *Id.* at DOJ23 002283. Moreover, the Inspectors subpoenaed telephone records from the telephone company, as well as from Voss, Gnau, and Spartin (and Spartin's employer) during their investigation, and they therefore had access to all of the relevant toll records for the time periods referenced. Ex. 91, SMFC3 13144-78, Inspectors' subpoena service and compliance report (master list); Ex. 92, SMFC3 13368-80, 10/26/87 Printout of Moore documents received by the Inspectors via subpoena; Ex. 93, 7/84-3/86 GTE letters to the Inspectors re: REI toll records produced (various Bates No. ranges); Ex. 24. Hartman 05/08/98 Dep. at 362-63. In addition, Moore produced his notebooks with his handwritten notes in them for the referenced time periods, giving the Inspectors access to any notes of phone calls (including those with Peter Voss) for the time periods in question. Ex. 94, WM 036024-460, Moore's Notebooks.

63. Contested as to completeness and materiality. Moore does not dispute that one of his postal notebooks that was produced during the investigation contained 44 sheets, instead of the 80 sheets referenced on the cover. Moore also does not dispute that there were no entries in that notebook between January 6, 1986 and June 24, 1986. However, during their interviews with Moore as part of their investigation, the Inspectors never asked why pages were missing or why there were no entries between certain dates in the notebook. Ex. 40, Moore Aff. ¶ 27. As Moore explained

during his deposition, it was his practice to occasionally remove pages from his notebook with information for his secretary to type, after which the pages would be discarded. Ex. 49, Moore Dep. at 330-31. This practice is confirmed by some of Moore's other notebooks that were produced during the investigation that did not contain all of their pages either. Ex. 95,WM 035216-326, Moore's 80 sheet spiral notebook for October through December 1985 (missing 25 pp.). Moreover, Moore used his notebooks randomly and did not always write in the same notebook, which explains why there are no entries in the referenced notebook between January 6, 1986 and June 24, 1986. Ex. 49, Moore Dep. at 329.

64. Contested as to accuracy, completeness and context. Moore does not dispute that his notebook from January 27, 1987 contains information similar to that referenced in this Paragraph, but it is not as quoted by the inspectors. *See* Inspectors' Br., Ex. B at Exhibit 11 (DOJ11 001045). These excerpts were based on a videotape that Moore watched, at the suggestion of REI's general counsel, about what to expect during a deposition. *See* Ex. 49, Moore Dep. at 304-06; Ex. 96, WM 035478-602, Moore's notebook at WM 035513 ("see deposition tape"). This information was conveyed to REI's staff during a staff meeting in order to help them understand what they could expect if they were interviewed or subpoenaed to testify in connection with the investigation. Ex. 49, Moore Dep. at 304-07. These notes do not reflect suggestions by Moore to REI's staff members to impede in any way the Inspectors' investigation. In fact, REI's staff recalled before the grand jury, when asked about these notes, that Moore encouraged his staff to be helpful, accurate and honest if

and when interviewed by the Inspectors. Ex. 97, SMFC3 03745, 6/04/87 Grand Jury Tr. (Paula Ezernack testimony). Similarly, the Inspectors were told during their interview of Frank Bray that Moore never suggested that Bray should destroy or conceal any documents or that he should change, withhold or conceal any information from the Inspectors. Ex. 41, Kormann Dep. at 673-74; Ex. 98, SMFC3 01886-96, Kormann notes of 07/14/87 Bray interview at SA4FC3 01889; Ex. 80, WM 16250-64, Kormann notes of 6/10/86 Bray Interview at WM 16250.

65. Contested as to characterization and completeness. In their testimony before the grand jury, REI's staff recalled that Moore had mentioned some of the referenced items (within the context of his comments, during a staff meeting and that Moore had likewise encouraged his staff to be helpful, accurate and honest if and when interviewed by the Inspectors. Ex. 97, SMFC3 03745, 6/04/87 Grand Jury Tr. (Paula Ezernack testimony). By way of further response, Moore incorporates by reference his response to Paragraph 64 as if set forth in full.

66. Not contested.

67. Contested as to completeness and materiality. While Unysis Corp. and REI teamed in October 1988 for a test of a multi-line OCR, REI's machines malfunctioned due to the USPS's failure to properly maintain the OCRs. In fact, Unysis claimed that an excessive amount of oil in the air lines to the machines was the likely cause of the malfunction. The malfunction was not, as alleged, based on inferior equipment. Ex. 99, POS-004-1088-90, 6112189 Internal USPS Memorandum.

68. Contested as to completeness and materiality. While the quoted language appears in the court's opinion, REI's machines malfunctioned due to the USPS's failure to properly maintain the OCRs. In fact, Unysis claimed that an excessive amount of oil in the air lines to the machines was the likely cause of the malfunction. Ex. 99, POS-004-1088-90, 6/12/89 Internal USPS Memorandum.

69. Contested as to completeness. While Robbins' only activity as part of the investigation was his polygraph examination of Spartin, Robbins learned during that polygraph that Spartin had been improperly provided with the grand jury statements and testimony of other witnesses, but he did nothing to investigate that matter or to raise any concerns about that issue. Ex. 52, Spartin Polygraph at 14, 16, 18, 19, 22, 28, 33; Ex. 100, Robbins Dep. at 76-79. By way of further response, Moore incorporates by reference Paragraphs 197-208, *infra*, as if set forth in full.

70. Contested as to completeness. While Moore does not dispute that Edwards worked on the investigation from mid-1985 through January 1987, he was an integral member of the investigative team involved in pursuing the investigation and potential charges against Moore and REI. Among other actions, Edwards was involved with other Inspectors in "digging up dirt" on Moore and REI's congressional supporters, as well as suggesting that REI's PAC contributions be investigated. Ex. 101, SMFC4 07980-82, Edward's notes regarding "digging up dirt" on REI's supporters; Ex. 21, Edwards Dep. at 200-05. Additionally, Edwards was a participant in the Spartin incident in which a copy of Spartin's immunity agreement was torn in two, and he engaged in what Inspector

Harrington believed to be inappropriate conduct during the investigation. Ex. 21, Edwards Dep. at 121-25; Ex. 26, Trial Tr. at 3446, 3467. By way of further response, Moore incorporates by reference Paragraphs 153-273, *infra*, as if set forth in full.

71. Contested as to accuracy and completeness. Moore does not dispute that McIntosh principally worked on the investigation from November 1985 to August 1987. However, McIntosh was asked by Clauson to rejoin the investigative team in late-1988. Moreover, McIntosh was an integral member of the investigative learn involved in pursuing the investigation and potential charges against Moore and REI. Among other actions, McIntosh was involved in improperly disclosing grand jury and other investigation materials to Carlin and participating in the incident in which a copy of Spartin's immunity agreement was torn in two. Ex. 22, McIntosh Dep. at 95-105, 108-09, 194, 197, 382-96; Ex. 102, DOJ23 000687-88; USA 015-0157-58, McIntosh notes dated 6/09/86 (with FBI laboratory examination results given to Carlin); Ex. 103, SMFC4 01183, 12/09/86 McIntosh notes of discussion with Carlin; Ex. 104 McIntosh notes dated May (SMFC1 00106), July (SMFC1 06884), and August 1989 (SMFC4 00889) evidencing later involvement in REI investigation. By way of further response, Moore incorporates by reference Paragraphs 153-273, *infra*, as if set forth in full.

72. Contested as to completeness. Moore does not dispute that Harman worked on the investigative team from November 1985 through the trial of Moore, Reedy and REI. In fact, Hartman was one of the leaders of the investigation and was involved, among other things, in preparing the "Arguments for

Indicting the Corporation" and the "Details of Offense," both of which targeted Moore for exercising his constitutional right to lobby Congress and the media. Ex. 24, Hartman 5/07/98) Dep. at 17, 173 and 4/20/00 Dep. at 60-61, 107; Ex. 36, SMFC3 09861-64, "Arguments for Indicting the Corporation"; Ex. 35, SMFC4 00004-147, "Details of Offense." He was also involved, among other things, in improperly disclosing grand jury materials to Spartin, participating in the preparation of scripted grand jury "witness statements," participating in the incident in which a copy of Spartin's immunity agreement was torn in half, participating in the incident in which Valder told William Hittinger that he (Valder) did not care whether Moore was guilty or innocent because he just wanted a high profile conviction, and suggesting that Moore be prosecuted. Ex. 24, Hartman 5/07/98 Dep. at 120-25, 148-49, 262, 310-14, 316-17, 336-38 and 5/08/98 Dep. at 413-14; Ex. 105, Valder Dep. at 7 7783; Ex. 41, Kormann Dep. at 448-49, 482-85, 519-21, 539-40. By way of further response, Moore incorporates by reference Paragraphs 153-273, *infra*, as if set forth in full.

73. Contested as to completeness. Moore does not dispute that Kormann worked on the investigative team from November 1985 through the trial of Moore, Reedy and REI. In fact, Kormann was one of the leaders of the investigation and was involved, among other things, in preparing the "Arguments for Indicting the Corporation" and the "Details of the Offense," both of which targeted Moore for exercising his constitutional right to lobby Congress and the media. Ex. 41, Kormann Dep. at 163-66, 744-45; Ex. 36, SMFC3 09861-64, "Arguments for Indicting the Corporation"; Ex. 35, SMFC4 00004-147, "Details of the

Offense." He was also involved, among other things, in improperly disclosing grand jury materials to Spartin, participating in he preparation of scripted grand jury "witness statements," participating in the incident in which a copy of Spartin's immunity agreement was torn in half, participating in the incident in which Valder told William Hittinger that he (Valder) did not care whether Moore was guilty or innocent be cause he just wanted a high profile conviction, and suggesting that Moore be prosecuted. Ex. 41, Kormann Dep. at 101, 333-37, 417, 426, 448-49, 482-85, 494, 519-21, 539-40, 563-64; Ex. 105, Valder Dep. at 177-83. By way of further response, Moore incorporates by reference Paragraphs 153-273, *infra*, as if set forth in full.

74. Contested. It is irrelevant whether or not the Inspectors were specifically instructed to prosecute Moore for his criticism of the USPS. The direct and circumstantial evidence shows that the Inspectors in fact sought Moore's indictment and prosecution because of his exercise of his First Amendment right to petition Congress and criticize the USPS in the media. *See, e.g.*, Ex. 36, SMFC3 09861-64, "Arguments for Indicting the Corporation"; Ex. 35, SMFC4 00004-147, "Details of the Offense." By way of further response, Moore incorporates by reference Paragraphs 153-273, *infra*, as if set forth in full.

75. Contested. The Inspectors were intimately involved in the decision to script the grand jury witness statements and have them presented to the grand jury. In fact, Inspectors Hartman and Kormann specifically discussed and agreed with Valder that witness statements should be prepared and presented to the grand jury. Ex. 41, Kormann Dep. at 519-21. In addition, it was common knowledge among the Inspec-

tors working on the case that witness statements were being prepared for presentation to the grand jury. *Id.* at 520. Moreover, the Inspectors had never before utilized such a procedure before the investigation and prosecution of Moore, nor did they ever use such a procedure after the case against Moore ended. Ex. 24, Hartman 5/07/98 Dep. at 272-73; Ex. 41, Kormann Dep. at 520; Ex. 21, Edwards Dep. at 139, 373-77; Ex. 26, Trial Tr. at 3478-79 (Harrington testimony).

76. Contested. The grand jury witness statements did not present a fair and accurate representation of what the Inspectors had been told during their interviews of the witnesses. Nor did witnesses hive any meaningful opportunity to review and make changes to their statements. *See, e.g.*, Ex. 26, Trial Tr. at 896-97, 903-05.

- John Gnau's statement, for example, omitted the central and critical fact that Gnau had never told Moore or anyone at REI about the payments to Voss. Gnau's statement likewise lacked any context for many of the alleged statements that were purportedly made by Reedy and/or others at REI. Ex. 41, Kormann Dep. at 576, 580, 583, 590-607; Ex. 39, DOJ23 001681-702, Gnau Statement; Ex. 26, Trial Tr. at 588, 590-91, 601, 60304, 606-11. By way of further response, Moore incorporates by reference Paragraphs 166-70, 173-79 and 219-20, *infra*, as if set forth in full.
- Spartin's statement too was carefully crafted to omit the fact that Spartin never told Moore or anyone at REI about the payoffs, as well as the fact that Spartin had no knowledge as to whether anyone else had ever told Moore about the payoffs. Ex. 106, DOJ28 000155-82, Grand Jury "Statement

of William Spariin (hereafter "Spartin Statement"): Ex. 26, Trial Tr. at 2719-22 (Spartin testimony); Ex. 41, Kormann Dep. at 496-97, 504-05, 521-25. By way of further response, Moore incorporates by reference Paragraphs 166-70, 173-79 and 210-16, *infra*, as if set forth in fill.

- Marcus's statement was also not a fair and accurate presentation of information that the Inspectors had been told during their investigation. For example, there was no mention of the fact that Marcus had never told Moore or anyone else at REI about the payoffs to Voss. Nor was there any context for many of the statements contained in Marcus' Grand Jury summary. Ex. 69, SFMC3 10034-57. Marcus Grand Jury Summary, Ex. 22, McIntosh Dep. at 344-74.

- Frank Bray's statment was also not the statement that Bray wanted to make. Ex. 26, Trial Tr. at 1808-13, 1832, 1952, 3477-92. In fact, the Inspectors have admitted that they refused to let Bray make changes to his statement even though it was supposed to be his statement. Ex. 41, Kormann Dep. at 620-24, 664. By way of further response, Moore incorporates by reference Paragraphs 166-70, 173-79 and 221-28, *infra*, as if set forth in full.

- Sharon Peterson's statement was handed to her on the day she arrived to testify before the grand jury. Prior to that time, she had never seen the statement, and she was not given any meaningful opportunity to review and revise the statement. Ex. 26, Trial Tr. at 896 97, 903-05. In fact, she testified that when she saw the statement, she "was perturbed somewhat in the way they had written it up." *Id.* at 897.

77. Contested. While the procedure described may have generally been followed, such a procedure was meaningless since the witnesses' grand jury statements were carefully scripted ahead of time and did not fairly and accurately represent what the witnesses had told the Inspectors. *See* Moore's response to Paragraph 76, which is incorporated by reference as if set forth in full. Moreover, the witnesses were not always present during the presentation of their statements and testimony to the grand jury. In fact, at one point, the summary statements for four out of the five co-conspirators—Voss, Gnau, Marcus, and Peterson—were given to the grand jurors to read on their own. Ex. 107, DOJ1 000540-64, 3/19/87 Grand Jury Tr. at DOJI 000543, 557-61 (Valder's statements to the Grand Jurors). There were no opportunities for the grand jurors to ask questions of these key witnesses. Moreover, instead of inviting back those witnesses to answer any questions, Valder asked the Inspectors to be present to answer any questions the grand jurors may have had when Valder read the witness summaries. *Id.* Similarly, Inspector Hartman at one point ended up testifying as to what the co-conspirators allegedly said, heard, and did. Ex. 108, WM 049037-62, WMG-008-0875-900, 3/19/87 Grand Jury Tr. (Hartman testimony). At several points during his testimony, Kormman purported to quote verbatim inculpatory statements allegedly made by Robert Reedy, which allegedly were made third hand to John Gnau. *Id.* at WM049051-52. Hartman did not, however, provide any exculpatory evidence to the grand jury. Ex. 24, Hartman 05/07/98 Dep. at 253-55, 269-271 and 05/08/98 Dep. at 419-20.

78. Contested. AUSA Valder—working in concert with Inspectors Hartman and Kormann—provided Spartin with grand jury summary statements of four co-conspirators for the purpose of shaping Spartin's testimony. Ex. 26, Trial Tr. at 22550-54, 2561, 2609, 272737; Ex. 41, Kormann Dep. at 148-50, 537-40, 556 (indicating that Inspectors were an integral part of the process that led to giving Spartin the grand jury statements of other witnesses); Ex. 105, Valder Dep. at 376-77 ("*we* gave [Spartin] parts of summary statements"), 421 ("***The Inspectors and I*** were religious in not letting [Spartin] know what other uses those documents had been put to . . ."); Ex. 24, Hartman 4/20/00 Dep. at 317; Ex. 52, Spartin Polygraph at 14, 16, 18, 19, 22, 28, 33. In fact, Spartin testified during the criminal trial than both Valder and the Inspectors were involved in providing him with the grand jury witness statements of other witnesses. Ex. 26, Trial Tr. at 2730. *See also* Ex. 109, DOJ28 000183A-229, 9/01/87 Spartin Grand Jury Tr. at DOJ28 000187-88, 000192 (Spartin acknowledged to the grand jury that he had been given materials by the Inspectors to "refresh his recollection," after which he gave his "opinion" that Moore must have known about the payments to Voss). Moreover, Inspector Kormann specifically testified that, with respect to the grand jury statements of Gnau and Marcus, "***my recollection is that is something that we would have given [Spartin] and, based on what he says here in this polygraph transcript, we probably did.***" Ex. 41, Kormann Dep. at 539-40 (emphasis added). Significantly, each one of the statements that were shown to Spartin had previously been presented to the grant jury as part of the respective witnesses' testimony. Ex. 26, Trial Tr. at 2550-54, 2561, 2609, 2727-37.

79. Contested. Moore disputes that Gettings —who is now deceased—specifically requested witness summary statements or grand jury testimony of other witnesses. There is no way Gettings would have been aware of the existence of the witness summaries of other grand jury witnesses unless the Inspectors and Valder had disclosed such information to him. As explained in Paragraph 78, AUSA Valder and Inspectors Hartman and Kormann collectively agreed to provide the witness statements to Spartin and Gettings for the purpose of shaping Spartin's testimony. Furthermore, it is immaterial whether Gettings requested any information from Valder or the Inspectors.

80. Contested. As explained in Paragraph 78, AUSA Valder and Inspectors Hartman and Kormann collectively agreed to provide the witness statements to Spartin and Gettings for the purpose of shaping Spartin's testimony. Furthermore, it is immaterial whether Gettings requested any information from Valder or the Inspectors.

81. Contested. As explained in Paragraph 78, AUSA Valder and Inspectors Hartman and Kormann collectively determined what materials would be provided to Spartin and Gettings.

82. Contested. As explained in Paragraph 78, AUSA Valder and Inspectors Hartman and Kormann collectively agreed to provide the witness statements to Spartin and Gettings for the purpose of shaping Spartin's testimony. In this respect, Spartin testified during the criminal trial that both Valder and the Inspectors were involved in providing him with the grand jury witness statements of other witnesses. Ex. 26, Trial Tr. at 2730. Moreover, Inspector Kormann specifically testified that, with respect to the grand jury

statements of Gnau and Marcus, "my recollection is that is something that we would have given [Spartin] and, based on what he says here in this polygraph transcript, we probably did." Ex. 41, Kormann Dep. at 539-40. Significantly, each one of the statements that were shown to Spartin had previously been presented to the grand jury as part of the respective witnesses' testimony. Ex. 26, Trial Tr. at 2550-54, 2561, 2609, 2727-37. By way of further response, Moore incorporates by reference his response to Paragraph 78.

83. Contested. As explained in Paragraph 78, AUSA Valder and Inspectors Hartman and Kormann collectively agreed to provide the witness statements—which had already been presented to the Grand jury as part of the witnesses' testimony—to Spartin and Gettings for the purpose of shaping Spartin's testimony. In this respect, Spartin testified during the criminal trial that both Valder and the Inspectors were involved in providing him with the grand jury witness statements of other witnesses. Ex. 26, Trial Tr. at 2730. Moreover, Spartin repeatedly stated in his polygraph examination that he was provided with the grand jury testimony of various witnesses, which "colored" his view of the facts. Ex. 52, Spartin Polygraph at 14, 16, 18, 19, 22, 28, 33. By way of further response, Moore incorporates by reference his response to Paragraph 78.

84. Contested as to completeness. At this meeting, Spartin was surrounded by as many as 10 postal Inspectors, including, among others, Hartman, Kormann, McIntosh and Edwards. One of the Inspectors who was present during this meeting with Spartin characterized it as a "bizarre" event that went from "bad to worse." Ex. 21, Edwards Dep. at 121-27; Ex. 105, Valder Dep. at 336; Ex. 41., Kormann Dep. at 426;

Ex. 24, Hartman 5/07/98 Dep. at 120-25 and 4/20/00 Dep. at 53-4; Ex. 22, McIntosh Dep. at 194; Ex. 26, Trial Tr. at 2595-96 (Spartin Testimony). Moreover, ripping up Spartin's immunity agreement was not a typical practice of the Inspectors or the prosecutor. In fact, the Inspectors had never witnessed or participated in such a tactic either before or after the Moore investigation. *See, e.g.*, Ex. 41, Kormann Dep. at 60, 427-28; Ex. 21, Edwards Dep. at 135; Ex. 24, Hartman 5/07/98 Dep. at 145-46. And the prosecutor admitted as well that the Moore case was the one and only time that he engaged in the tactic of physically ripping up a witness' immunity agreement. *See* Ex. 105, Valder Dep. at 686. By way of further response, Moore incorporates by reference Paragraphs 188-93, *infra*, as if set forth in full.

85. Not contested. By way of further response, Moore incorporates by reference Paragraphs 197-208, *infra*, as if set forth in full.

86. Contested as to completeness. The purpose of Spartin's polygraph was principally two-fold: to determine (1) whether Spartin had any personal knowledge of whether REI had been told about or was aware of the payments being made to Voss, and (2) whether Spartin had planned with anyone to withhold or conceal any information from the investigators. Ex. 100, Robbins Dep. at 27-28, 58. The examination showed that Spartin was being truthful when he said 19 times that he had no knowledge of anyone at REI being told about or being aware of the payoffs to Voss and when he said that he had not agreed with anyone to conceal any facts or information from the investigators. *Id.* at 71. By way of further response, Moore incorporates by reference Paragraphs 197-208, *infra*, as if set forth in full.

87. Contested. Moore does not contest that Hartman and Kormann met with Carlin on September 20, 1988 to verify the accuracy of some of the information within the draft indictment. Moore also does not dispute that the Inspectors had a copy of the draft indictment with them when they visited Carlin to discuss certain facts in the draft indictment. Moore does contest, however, that the draft indictment was never shown to or identified to Carlin during the interview. Although direct evidence exists that the Inspectors physically handed a copy of the indictment to Carlin, a reasonable inference exists that the indictment was actually shared with Carlin, particularly in light of the fact that (1) the Inspectors actually had the draft indictment with them at Carlin's interview; (2) the indictment that was actually returned against Moore, Reedy and REI contained language that had been suggested by Carlin during his meeting with inspectors Hartman and Kormann on September 20, 1988, Ex. 26, Trial Tr. at 2151-64; and (3) there is direct and circumstantial evidence of retaliatory intent that exists in this case. See *infra* ¶¶ 153-273, which are incorporated by reference herein as if set forth in full. Moreover, the record shows that Carlin and/or his counsel were provided with other information or restricted documents prepared by the inspection service, leading to a reasonable inference tht the draft indictment was also shared with Carlin. See ¶¶ 255-64, *infra*, which are incorporated by reference herein as if set forth in full; Ex. 110, SMB5 01738-39, Correspondence between Clauson and Carlin's attorney (Saltzstein).

88. [sic]. Contested. McIntosh's notes taken contemporaneously with his telephone conversation with Carlin state "T/C Paul Carlin [12/09/86, 9:55 a.m.]

Mr. Carlin asked for results from interviews with DPMG Strange and others regarding the second memo on the BOG freeze order. I advised him of the results of the interviews with Casey, McKean, Strange and the lab examination." Ex. 103, SMFC4 01183, 12/09/86 McIntosh's notes of discussion with Carlin; Ex. 22, McIntosh Dep. at 382-89. Former Chief Postal Inspector Clauson testified that this disclosure of investigative information to Carlin was improper, and McIntosh admitted that the Inspection Service had a policy in effect at that time that prohibited the disclosure of investigative materials to third parties. Ex. 20, Clauson Dep. at 168; Ex. 22, McIntosh Dep. at 136-37. Moreover, while McIntosh would not have disclosed the results of the investigation to an ordinary citizen, or to an ordinary postal employee for that matter, he nonetheless disclosed the results to Carlin to assist him in litigation and because he felt that Carlin was "getting screwed." Ex. 22, McIntosh Dep. at 389-93. By way of further response, Moore incorporates by reference Paragraphs 256-61, *infra*, as if set forth in full.

89. [sic]. Not contested. By way of further response, Moore incorporates by reference his response to Paragraph 88 [sic] as if set forth in full.

90. [sic]. Contested. McIntosh's contemporaneous notes of his discussion with Carlin reflect the fact that McIntosh informed Carlin of the results of interviews with Casey, McKean and Strange, as well as the results of a confidential laboratory examination. Ex. 103, SMFC4 01183, 12/09/86 McIntosh's notes of discussion with Carlin; Ex. 22, McIntosh Dep. at 382-89. Former Chief Postal Inspector Clauson testified that this disclosure of investigative information to Carlin was mproper, and McIntosh admitted that the Inspec-

tion Service had a policy in effect at that time that prohibited the disclosure of investigative materials to third parties. Ex. 20, Clauson Dep. at 168; Ex. 22, McIntosh Dep. at 136-37. Moreover, while McIntosh would not have disclosed the results of the investigation to an ordinary citizen, or to an ordinary postal employee for that matter, he nonetheless disclosed the results to Carlin to assist him in litigation and because he felt that Carlin was "getting screwed." Ex. 22, McIntosh Dep. at 389-93. By way of further response, Moore incorporates by reference Paragraphs 256-61, *infra*, as if set forth in full interview.

B. Plaintiff's Statement of Material Facts Not Genuinely Disputed

In further response to defendants' statement of undisputed facts, Moore submits the following additional facts in opposition to Defendants' summary judgment motions.

The OCR Scanner Controversy

91. In the early 1980s, the USPS decided to use optical character reading equipment to facilitate the indentification of addresses on mail. As part of its OCR strategy, the USPS considered whether to employ multi-line or single-line scanners. Ex. 40, Moore Aff. ¶¶ 16, 18-22; Ex. 111, DOJ 000032-372, 1/87 Zip+4/ Automation Investigation Report; Ex. 23, 002653-778, 1984 OTA Report.

92. Recognition Equipment, Inc. ("REI") was a Dallas-based company that manufactured, among other things, equipment that could scan or read characters and process that information. Ex. 40, Moore Aff. ¶ 15.

93. Using $50 million worth of USPS research and development funds, REI had developed multi-line optical character reading equipment that would enable the USPS to fully implement its proposed Zip+4 strategy without having to persuade large commercial mailers to convert their mailing lists to Zip+4. Ex. 40, Moore Aff. ¶¶ 15, 16, 18. Five MLOCRs manufactured by REI were actually implemented in "live mail" environments around the country. *Id.* ¶ 18.

94. REI was he only American company that had developed MLOCR technology in the early 1980s. *Id.* ¶ 18.

95. REI's chief competitor in the OCR procurement process was ElectroCom Automation (ECA), who had teamed with a Geman company called AEG Telefunken (AEG) to manufacture OCR equipment. Ex. 40, Moore Aff.¶ 40.

96. In March 1982. Moore became the president of REI. Ex. 40, Moore Aff. ¶ 6.

97. The relationship between REI and the USPS was strained before Moore's arrival at REI and worsened after Moore took over leadership of the company. *Id.* ¶¶ 15-22.

98. Shortly after taking office at REI, Moore met with Postmaster General William Bolger to urge the USPS to adopt multi-line optical scanners. In addition, Moore communicated frequently with Bolger in an effort to sell MLOCRs to the USPS. *Id.* 116.

99. In September 2, 1983, in response to Moore's urging the USPS to reconsider deployment of SLOCR technology (Ex. 112, WM 003321-22, 8/24/83 Moore letter to Bolger), PMG Bolger esponded in a letter to Moore that "I am concerned that a vendor with

a vested interest is attempting to influence the competitive procurement process of the Postal Service by interfering with our internal decisions." Ex. 113, WM 068363-64, 09/02/83 Bolger letter to Moore; Ex. 11 4, WM 003325-26, 9/09/83 Moore's response to Bolger. This response was actually prepared under the direction of SAPMG Jellison, who confirmed that the USPS was frustrated with Moore's lobbying and media activities. Ex. 86, Jellison Dep. at 74-76, 92-93, 188-90.

100. During their investigation, the Inspectors learned that in 1983, Bolger's deputy, James Jellison, told Robert Reedy, Vice President for Marketing at REI, that REI would not receive any USPS business "while (Jellison) was the head of Postal Service operations." *Recognition Equip*, 725 F. Supp. at 600; Ex. 26, Trial Tr. at 1759. The Postal Service was "upset" and "frustrated" by Moore's and REI's efforts to publicly push for MLOCR technology while the USPS was trying to implement its Zip+4 strategy. Ex. 86, Jellison Dep. at 72-75.

101. The USPS eventually adopted multi-line technology for automated mailing sorting. Ex. 40. Moore Aff ¶ 21; Ex. 21, Edwards Dep. at 550.

102. In late 1983, however, Bolger announced that there was no future for multi-line technology in the United States and stated that the USPS would use single-line technology instead. *Id.* ¶ 19.

103. Following Bolger's 1983 announcement that the USPS would use single-line OCR technology, Moore "went public" with his criticisms of the USPS, going to the media and members of Congress. *Id.* ¶¶ 20-22; Ex. 65 Congressional letters (various Bates No. ranges). Moore's lobbying included contacting

members of Congress and testifying before Congressional committees. *Id.*; Ex. 26, Trial Fr. at 1616-1617, 1731, 1734-36. Bolger asked Moore on several occasions to "back off" of his criticisms of USPS management. Ex. 40, Moore Aff. 1 20; Ex. 41, Kormann Dep. at 187-88.

104. In response to REI's congressional and media campaigns, the USPS actively solicited the assistance of ECA—REI's chief rival and a competitor in the OCR race—to wage a counter-campaign against REI in Congress. Ex. 22, McIntosh Dep. at 255-58; Ex. 115, DOJ23 00649-53, 01/26/86 McIntosh notes of Buzard interview at DOJ23 000650; Ex. 24, Hartrnan 4/20/00 Dep. at 233-35.

105. The issue of multi-line versus single-line technology "was not simply a formal procurement issue within the USPS but was a subject of significant public debate involving executive studies, legislative inquiries and broad media exposure." *Recognition Equip.*, 725 F. Supp. at 590. It fact, on October 23, 1985, Congressman English expressed dissatisfaction regarding USPS' handling of the OCR situation, and during a public hearing stated that USPS had "screwed up" and that "unless we have somebody's hide nailed to the barn door" the situation would not get any better. Ex. 116, SMFC4 07521-32, Transcript of 10/23/85 Congressional hearing at 07524 and 07526.

106. In June 1984, the Office of Technology Assessment ("OTA") and the General Accounting Office ("GAO") presented their respective analyses of the automation issue to Congress. "The GAI and OTA studies that were presented to Congress concluded that as a result of the USPS failure to convert to multiline technology the daily operational losses of the USPS

were over one' milion dollars." *Recognition Equip.*, 725 F. Supp. at 590. In addition, the OTA report recommended that a split procurement of MLOCRs and SLOCRs proceed on a dual track as the most appropriate course of action for automating the USPS. Ex. 23, 002653-778, 1984 OTA Report at 002664.

107. Throughout 1984, 1985 and 1986, Moore continued his congressional and media campaigns to win an automation contract for REI. Ex. 40, Moore Aff. ¶¶ 21-22. Moore worked particularly closely with Congressmen Jack Brooks and Martin Frost, but also lobbied the USPS BOG as well. *Id.*; Ex. 67, WM 004798-99, 7/02/84 Moore letter to BOG. In addition, Moore worked with Representative Frost to draft a "Buy American" amendment (a/k/a the "Frost Amendment") to a USPS appropriations bill that, if passed, would have enabled REI to secure a contract for MLOCRs. Ex. 40, Moore Aff. ¶ 21; Ex. 35, SMFC4 00004-147, "Details of Offense" at SMFC4 00072; Ex. 36, SMFC3 09861-64, "Arguments for Indicting the Corporation" at SMFC 09861.

108. After Paul Carlin became the Postmaster General in January 1985, he met with John Gnau and Michael Marcus to discuss REI and the procurement issue. Ex. 117, SMFC4 11063-70, 3/10/86 Carlin Memorandum Interview at SMFC4 11069. During that meeting, Carlin specifically directed REI and its consultant, GAI, to communicate and deal directly with the Technology Committee of the BOG in connection with REI's case for MLOCRs. *Recognition Equip.*, 725 F. Supp. at 591; Ex. 41, Kormann Dep. at 387; Ex. 26, Trial Tr. at 345 (Gnau testimony). The inspectors were aware of this fact during their investigation. Ex. 41, Kormann Dep. at 387; Ex. 22, McIntosh Dep. at 339,

351-52; Ex. 118, WM 007018-29, McIntosh notes of 8/01/86 Marcus interview at WM 007023 ("[Paul Carlin] suggested using Technology and Development Committee as avenue").

109. As early as March 1985, USPS management was aware of Spartin's affiliation with GAI and that Spartin was in fact the president of GAI. *Recognition Equip.*, 725 F. Supp. at 597-98. On March 12, 1985, Marcus sent a letter to Deputy PMG Jackie Strange on GAI letterhead with Spartin's name shown in red ink as the President of GAI. Ex. 119, WM 004819- 20, 3/12/85 Letter from Marcus to Strange; Ex. 26, Trial Tr. at 727-28, 730-31, 2998, 3185-86. This letter was circulated to other senior USPS management, as well as to various members of the Board of Governors. Ex. 26, Trial Tr. at 3177; *Recognition Equip.*, 725 F. Supp. at 597.

110. On July 12, 1985, PMG Carlin announced a "mid-course correction" in which the USPS changed its strategy for automation from SLOCRs to MLOCRs. Ex. 120, WM 069919-22, 7/14/85 Memorandum from Carlin to BOG.

111. The mid-course correction was viewed by members of the BOG as a "sensible decision in the face of advancing technology." In addition, while there was some disagreement within the BOG over whether a sole source contract should be awarded to any vendor, none of the BOG members expressed any resistance to the mid-course correction. Ex. 121, SMFC4 10363-72, 12/06/85 William Sullivan Interview Memorandum at SMFC4 10364.

112. Similar to REI, ECA had its own consultants with inside ties to USPS management and

members of the BOG. In the Fall of 1985, for example, ECA retained the consulting firm of Nofziger-Bragg, who offered ECA advice on postal procurement matters and political strategy. Ex. 122, SMFC4 10673-84, 4/22/86 Mark Bragg Interview Memorandum at SMFC4 10674; Ex. 26, Trial Tr. at 2295-303, 2304, 2307-08, 2310. Lynn Nofziger, a principal at Nofziger-Bragg, recommended Voss for an ambassadorship to Nigeria. Ex. 122, SMFC4 10673-84, 4/22/86 Bragg Interview Memorandum at SMFC4 10682.

113. During their investigation, the Inspectors were aware that ECA's consultants were actively lobbying USPS management and BOG members behind the scene, including Voss, Peters, and McKean. *Id.* at 6; Ex. 123, SMFC4 09862-78, 4/30/86 Ruth Peters Interview Memorandum at SMFC4 09877; Ex. 22, McIntosh Dep. at 254-55; Ex. 124, DOJ23 000642-48, 01/21/86 Buzard Interview Notes at 000646 ("[ECA] hired a consulting firm in October"); Ex. 125, USA-102-0101, 1/03/85 Memorandum to Carlin re: Ray Schmidt's request to meet: Ex. 126, USA-002-0105-07, USA-002-011, 1/30/85 Carlin letters to Peter Meinig and Bob Buzard.

114. The Inspectors were aware during their investigation that there were several members of the BOG, in addition to Voss, that favored multi-line technology over SLOCRs. Ex. 127, USA-015-0134-35, Memorandum regarding George Camp's public support of MLOCRs; Ex. 128, USA-015-0140, McIntosh notes of 6/04/86 Sharon Coruzzi interview; Ex. 4, SMFCI 07802-06, 4/15, 85 BOG Meeting Tr.; Ex. 129, SMFC4 10346-49, 12/03/85 Camp Interview Memorandum at 10346-47; Ex. 130, SMFC4 10500-04, 1/08/86 Gordon Morrison Interview Memorandum at SMFC4 10501; Ex. 123,

SMFC4 09862-78, 4/30/86 Peters Interview Memorandum at SMFC4 09864-68.

REI's Contract With Gnau & Associates, Inc.

115. On or around September 3, 1984, Voss met with Reedy at the Mansion restaurant in Dallas, Texas. *Recognition Equip.*, 725 F. Supp. at 590; Ex. 4 7, DOJ4 0013891400, 3/9-11/88 Voss Interview Memorandum at DOJ4 0001390; Ex. 50, SMFC3 00236-50 7/25/86 Reedy Interview Memorandum at SMFC3 00237.

116. As a member of the USPS Board of Governors, Voss had been appointed by the President of the United States and confirmed by the United States Senate. *Recognition Equip.*, 725 F. Supp. at 590.

117. The Inspectors were told by Voss that the dinner with Reedy at the Mansion was Voss's suggestion in order to apologize for the fact that the BOG Technology Committee had canceled at the last minute its scheduled visit to tour REI's facility. Ex. 47, DOJ4 001389-1400, 3/9-11/88 Voss Interview Memorandum at DOJ4 001390; Ex. 123, SMFC4 09862-78, 4/30/86 Peters Interview Memorandum at SMFC4 09864.

118. During the meeting between Voss and Reedy at the Mansion, Voss told Reedy that he believed REI had a good product and that, in the interests of the USPS, he wished that REI would retain someone to aid them in packaging and presenting their product to the USPS. *Recognition Equip.*, 725 F. Supp. at 590; Ex. 47, DOJ4 001389-1400, 3/9-11/88 Voss Interview Memorandum at D0J4 001390-92; Ex. 50. SMFC3 0023650, 7/25/86 Reedy Interview Memorandum at SMFC3 00240.

119. The Inspectors were told by Voss that, in response to Reedy's question to Voss about how REI could most effectively make a presentation to the BOG, Voss told Reedy that he (Voss) was capable of making the proper presentation, but could not do so because he was a member of the BOG. Voss also told the Inspectors that he informed Reedy during the Mansion dinner that "[he] felt it would be inappropriate to make such a presentation on behalf of a vendor." *Recognition Equip.* at 590; Ex. 47. DOJ4 00138-1400, 3/9-11/88 Voss Interview Memorandum at DOJ4 00:390; Ex. 35, SMFC4 00004-117, "Details of Offense" at SMFC4 00038.

120. According to Voss, Reedy told Voss during the Mansion dinner that REI was represented by Hill & Knowlton, to which Voss replied that REI needed someone "lower key and less emotional." Ex. 47, DOJ4 001389-1400, 3/9-11/88 Voss Interview Memorandum at DOJ4 001390; Ex. 50, SMFC3 00236-50, 7/25/86 Reedy Interview Memorandum at SMFC3 00237; Ex. 41., Kormann Dep. at 795-96. "Voss was very hesitant to give names of any company [because it] wasn't his place to do so." *Recognition Equip.*, 725 F. Supp. at 590. Voss told the inspectors that he suggested three different entities: GAI , Grey & Company and Nofziger-Bragg, Inc., and it was only after Reedy asked Voss which one REI should choose that Voss indicated GAI. Ex. 47, DOJ414 001389-1400, 3/9-11/88 Voss Interview Memorandum at DOJ4 001390-91; Ex. 131, SMFC4 10751-71, 5/09/86 Voss Interview Memorandum at SMFC4 1075455; Ex. 41, Kormann Dep. at 789-90, 795-96.

121. "The government [had] no evidence of the impropriety of a Governor having lunch with an officer

of a company who was seeking to do business with the USPS." *Recognition Equip.*, 725 F. Supp. at 590.

122. Prior to his meeting with Reedy at the Mansion restaurant in September 1984, Voss was a proponent of multi-line OCR technology. Ex. 132, SMFC3 08908, 6/29/84 Voss letter to Congressman Jack Brooks re: support for MLOCR (transcribed by Inspectors); Ex. 35, SMFC4 00004-147, "Details of Offense" at SMFC4 00006 ("In June 1984, Voss informed Congressmen Martin Frost and Jack Brooks of his support for the USPS purchase of MLOCRs from REI."); Ex. 133, SMFC3 02754-71, 3/03/87 Hartman memo to file of "REI Interviews" at SFMC3 02757 (Voss contacts Congressman Frost's office) and 02761 (Voss contacts Congressman Brooks' office); Ex. 134, SMFC3 06930-86, Inspectors' summary of Voss' interviews at SMFC3 06938. In fact, "[s]everal months prior to the tine that Voss met with REI, he had publicly expressed caution in proceeding with singleline technology before studies ordered by Congress on the mutiline/singleline debate were completed." *Recognition Equip.*, 725 F. Supp. at 590; Ex. 26, Trial Tr. at 1583.

123. Despite Voss' recommendation of GAI in September 1984, REI did not actually retain GAI until many months later. REI saw no need to rush into a new consulting relationship when the political climate in Washington, D.C. was uncertain and a new PMG was coming into office in January 1985. *Recognition Equip.*, 725 F. Supp. at 590-91; Ex. 49, Moore Dep. at 210-11; Ex. 41, Kormann Dep. at 789-90, 795-96; Ex. 26, Trial Tr. at 1618-19; Ex. 50, SMFC3 00236-50, 7/25/86 Reedy Interview Memorandum at SMFC3 00239-40.

124. "In apparent frustration over [REI's] delay in signing an agreement and [REI's] failure to

return his telephone calls, Gnau did not complain to [Moore or REI], but instead complained to Voss." *Recognition Equip.*, 725 F. Supp. at 591; Ex. 26, Trial Tr. at 645, 293, 307.

125. The contract between REI and GAI was not executed until late February 1985. Ex. 42, DOJ38 000039-43, USA-028-0036-40, 2/85 REI/GAI consulting contract; *Recognition Equip.*, 725 F. Supp. at 591. The contract was dated "as of" January 15, 1985 to reflect the fact that GAI had actually begun its consulting work in January 1985, and the "15th" reflected the payment schedule for the retainer as set forth in the consulting contract. *Id.*; Ex. 26, Trial Tr. at 358.

126. Pursuant to the terms of the consulting agreement, REI agreed to pay GAI's standard fee of $30,000, payable in three equal monthly installments on the 15th of each month. Ex. 22, McIntosh Dep. at 353-58; Ex. 135, WM 006987-7003, Inspector's notes of 7/31/86 Marcus interview, at WM 007000; Ex. 77, WM 007030-137, Inspectors' notes of 8/05/86 Marcus interview at WM 007054. In addition, REI negotiated a contingency fee of 1% of the value of any contracts received from the USPS, which was one-half of the fee that GAI had originally proposed. Ex. 42, DOJ38 000039-43, USA-028-003640, 2/85 REI/GAI consulting contract; Ex. 26, Trial Tr at 1624-25.

127. REI's contract with GAI was not kept a secret. In fact, members of REI's Board of Directors were aware of the contract at the time that it was negotiated and signed. Ex. 136, SMFC3 02514-25, Inspectors' notes of 12/03/87 Runnion interview at SMFC3 02514; Ex. 137, SMFC3 02722-42, Inspectors' notes of 2/19/87 Sheinberg interview at SFMC3 02737; Ex. 41, Kormann Dep. at 295-96, 298-99, 325. They

were also aware that GAI's contract was subsequently renegotiated. Ex. 41, Konnann Dep. at 303-04, 325.

128. At the time that REI began dealing with GAI, "GAI was a capable firm which presented a respectable client list to REI which included Ford Aerospace, Continental Airlines and Warner Amex Cable Communications, Inc." *Recognition Equip.*, 725 F. Supp. at 592; Ex. 26, Trial Tr. at 620. "Moreover, prior to REI's entering into an agreement, Bray reported to Reedy that GAI's technical man, Marcus, was extremely conversant with the issues of OCR technology." *Recognition Equip.*, 725 F. Supp. at 592; Ex. 26, Trial Tr. at 1623. GAI, with the support of Voss, also was able to schedule a meeting with Carlin in early January 1985 to discuss REI and the procurement issue. Ex. 117, SMFC4 11063-70, 3/10/86 Carlin Memorandum Interview at SMFC4 11069.

129. Contingency fees were a standard fee arrangement in the consulting business, and GAI had contingency fee agreements with up front retainers with most of its clients. Ex. 26, Trial Tr. at 231, 705-07; Ex. 138, SMFC3 03638, 3/08/88 Grand Jury Tr. (testimony of Robert Drury, REI Corporate Controller) ("We [REI] do enter into contingent-fee contracts as a regular course of business . . ."); Ex.l39, SMFC3 03961-62, 3/15/88 Grand Jury Tr. (testimony of George O'Brien, V.P. and Chief Financial Officer of REI); Ex. 22, McIntosh Dep. at 333-34. Even the USPS legal department concluded that REI's contingency fee with GAI was not necessarily improper under postal service regulations. Ex. 140, WM 003653-60, 6/11/86 USPS internal legal opinion re: REI contingent fee.

130. The written contract between REI and GAI strictly forbade GAI from engaging in any illegal

activity as part of the consulting work for REI. Ex. 42, DOJ38 000039-43, USA-028-0036-40, 2/85 REI/GAI consulting contract.

131. Noone at REI was told to keep the fact of the Voss/Reedy meeting at the Mansion restaurant or the referral of GAI to REI a secret. *Recognition Equip.*, 725 F. Supp. at 593; Ex. 26, Trial Tr. at 1614-15. In fact, several members of REI's Board of Directors and senior management, including Israel Sheinberg and George O'Brien, were aware that GAI had been recommended by Voss and that REI had entered into a consulting agreement with GAI. *Recognition Equip.*, 725 F. Supp. at 593; Ex. 26, Trial Tr. at 3815-17; Ex. 137, SMFC3 02722-42, Inspectors' notes of 2/19/87 Sheinberg interview at 02725 and 02735; Ex. 141, SMFC3 02681-90, Inspectors' notes of 1/28/87 O'Brien interview at SMFC3 02689.

132. The process by which the GAI/REI contract was formed was an "entirely normal process." *Recognition Equip.*, 725 F. Supp. at 593.

The Voss/Gnau Conspiracy

133. "Voss and Gnau had a criminal venture in place before Voss approached REI with the proposal that REI hire the services of Gnau." *Recognition Equip.*, 725 F. Supp. at 589; Ex. 44, SMFC4 10974-97, 8/05-06/86 Marcus Interview Memorandum at SMFC4 1097982; Ex. 39, DOJ23 001681-702 Gnau Statement at DOJ23 001682-74, 001688.

134. "Voss and Gnau had established a scheme whereby Gnau would send checks in the name of Decisions Systems, Inc., for 'industrial leads' or referrals to GAI." *Recognition Equip.*, 725 F. Supp. at 590; Ex. 26, Trial Tr. at 621-22; Ex. 39, D0123 001681-702, Gnau

Statement. Gnau's payments to Voss were made to Decisions Systems in order to conceal the payment scheme to which Voss and Gnau had agreed. Ex. 39, DOJ23 001681-702, Gnau Statement at DOJ23 001684; Ex. 4, SMFCI 07802-06, 4/15/84 Agreement between Gnau and Decision Systems; Ex. 22 McIntosh Dep. at 342-43.

135. "Prior to the time that Voss had approached REI, Voss and Gnau had targeted several companies for whom GAI could provide postal-related representation and use Voss' USPS connection for their benefit." *Recognition Equip.*, 725 F. Supp. at 590; Ex. 39, DOJ23 001681-702, Gnau Statement at DOJ23 001681-87.

136. The Inspectors had no evidence that Moore, Reedy or REI knew about Gnau's criminal scheme with Voss. *Recognition Equip.*, 725 F. Supp. at 590. In fact, none of the conspirators involved n the kickback scheme ever told Moore or anyone else at REI that payments were being made to Voss. Ex. 21, Edwards Dep. at 119-20, 526; Ex. 24, Hartman 5/07/98 Dep. at 132, 134-36, 249; Ex. 41, Kormann Dep. at 132-34, 136, 37; 507-08, 580; 591 94, 794; Ex. 22, McIntosh Dep. at 185-86. In this respect, Voss himself told the Inspectors and Valder that there was "no way Moore knew" anything improper was being done. Ex. 142, DOJ3 001244, 03/08/88 Knight memo regarding Peter Voss Interview with Valder's handwritten notes

Carlin's Dismissal and Replacement as Postmaster General

137. Paul Carlin became the Postmaster General of the USPS on January 1, 1985. Ex. 35, SMFC4 00004-147, "Details of Offense" at SMFC4 000044.

138. Like every other Postmaster General, Carlin was appointed by the Board of Governors and served at the will of the BOG. Ex. 26, Trial Tr. at 2197; Ex. 41, Kormann Dep. at 369-70.

139. On January 6, 1986, the BOG voted unanimously to terminate Carlin as Postmaster General because they were not satisfied with his performance. *Recognition Equip.*, 725 F. Supp. at 599; Ex. 26, Trial Tr. at 2979-80, 2988, 2991; Ex. 143, SMFC1 15050-51, 1/06/86 BOG Meeting Minutes; Ex. 24, Hartman 5/07/98 Dep. at 114-15 and 4/20/00 Dep. at 45; Ex. 41, Kormann Dep. at 362.

140. The Inspectors had no evidence that Moore or anyone else at REI exercised any influence over any members of the BOG to cause them to vote for Carlin's removal. *Recognition Equip.*, 725 F. Supp. at 599. In fact, Inspector Kormann admitted that, as far as he knew, Moore had no involvement with the removal of any USPS personnel. Ex. 41, Kormann Dep. at 369. Similarly, there was no evidence that Spartin played any role in either Carlin's removal or the removal of any other USPS management personnel. Ex. 26, Trial Tr. at 2758-59, 2764.

141. Prior to Carlin's termination as Postmaster General, various members of the BOG were unhappy with Carlin's performance. Ex. 144, WM 004903-04, 11/27/85 Peters letter to Carlin. In fact, as early as August 1985, John McKean, the Chairman of the BOG, began considering Carlin's removal because Carlin was not effectively leading the USPS and was exhibiting poor management style. Ex. 145, SFMC4 10741-49, Si07186 McKean Interview Memorandum at SMFC4 10741-42; Ex. 24, Hartman 4/20/00 Dep. at 150; Ex. 41, Konnann Dep. at 370-71, 772; Ex. 146, WM 009054-55,

Inspector's notes of 7/22/86 Spartin interview at WM 009055.

142. In August 1985, McKean approved the activation of the BOG Contingency Committee to search for Carlin's replacement. Ex. 145, SMFC4 10741-49, 5/07/86 McKean interview Memorandum; Ex. 146, WM 009054-55, Inspector's notes of 7/22/86 Spartin interview at 009055. Voss recommended Spartin to conduct the search, but it was actually McKean who initially approached Spartin about the search for a new PMG. *Id.*; Ex. 26, Trial Tr. at 2694-95. McKean told Spartin that Carlin was not fulfilling his responsibilities as PMG and that Carlin was not up to the job of being the PMG. Ex. 26, Trial Tr. at 2646-47.

143. On December 2, 1985, the BOG met to discuss their dissatisfaction with Carlin's performance as PMG. Ex. 26, Trial Tr. at 2927-28. Following this meeting, certain BOG members, including Chairman McKean, Gerald Ryan and Peter Voss, met with Carlin concerning his job performance. Ryan acted as the spokesperson during this meeting and told Carlin that he had been "wounded" in his position as Postmaster General in dealing with the BOG and USPS management. Ex. 145, SMFC4 10741-49, 05/07/86 McKean Interview Memorandum at SMFC4 101743; Ex., 26, Trial Tr. at 2929-31; *Recognition Equip.*, 725 F. Supp. at 599.

144. In addition to the BOG's view that Carlin was an ineffective PMG, members of senior management at the USPS were also critical of Carlin's performance. Ex. 35, SMFC4 00004-147, "Details of Offense" at SMFC4 00138; Ex. 26, Trial Tr. at 2200-01, 2694-95; Ex. 41, Kormann Dep. at 362-63, 370, 772. For example, Associate Postmaster General Jackie Strange

and other Regional Postmaster Generals were unhappy with Carlin's performance as Postmaster General. Ex. 26, Trial Tr. at 2473, 2930-31; Ex. 145. ST4FC4 10741-49, 05/07/86 McKean Interview Memorandum at SMFC4 10744. James Jellison, the SAPMG of Operations, thought Carlin "did a terrible job" as PMG and told the postal Inspectors that he believed that Carlin was ineffective and did not deserve to be Postmaster General. Ex. 86, Jellison Dep. at 172-75.

145. Inspector Edwards admitted that "Carlin was not viewed as a particularly strong Postmaster General. . . . So I think there was some sigh of relief [when he was fired] in the sense that they felt like that whatever happened that you wouldn't have somebody who would make one decision and then sort of unmake it, I mean, that you'd get a stronger element." Ex. 21, Edwards Dep. at 185-86.

146. Moore was not aware that the BOG was considering replacing Carlin and/or that Spartin had the search contract for Carlin's replacement until December 1985 when Spartin contacted Moore requesting possible candidates for postmaster general. Ex. 40, Moore Aff. ¶ 24; Ex. 109, DOJ28 000183A-229, 9/01/87 Spartin Grand Jury at 27-28; Ex. 26, Trial Tr. at 2700; Ex. 147, WM 009032-34, 8/04/87 McIntosh notes of Spartin interview at WM 009033 ("Spartin never showed the [Carlin gallows] letter to REI"). Moore's reaction was one of surprise and being "floored" when he learned the news that Carlin was possibly going to be replaced. Ex. 49, Moore Dep. at 245-46.

147. In response to Spartin's inquiry about possible PMG candidates, Moore provided Spartin with the names of three preeminent American businessmen: John Lawrence, Chester Nimitz, and Albert Casey.

Moore did not, however, recommend any particular candidate over any other candidate. Ex. 22, McIntosh Dep. at 322. Moreover, as was his standard practice when suggesting anyone for any position, Moore also told Spartin that if he wanted to contact any of these possible candidates, Spartin should let Moore know so that Moore could make a courtesy call to let these candidate know that Spartin would be contacting him. Moore did eventually—albeit reluctantly—contact Casey at Spartin's request to see if Casey would take Spartin's call. Ex. 148, WM 010315-23, 3/20/86 Casey Interview Memorandum at WM 010315; Ex. 49, Moore Dep. at 250, 256-59; *Recognition Equip.*, 725 F. Supp. at 600; Ex. 26, Trial Tr. at 2705; Ex. 52, Spartin Polygraph at 27.

148. Moore did not keep his recommendation of Casey, Nimitz and Lawrence a secret. In fact, he informed various members of the REI Board of Directors that the recommendations had been made. Ex. 136, SMFC3 02514-25, Inspectors' notes of 12/03/87 Runnion interview at SMF C3 02515; Ex. 149, SMFC3 02538-51, Inspector's Notes of 12/03/87 Seay interview at SFMC3 D2540; Ex. 137, SMFC3 02722-420, Inspectors' notes of 2/19/87 Sheinberg interview at SMFC3 02723, 02738; Ex. 41, Kormann Dep. at 296-98, 301, 307-08, 313, 326.

149. In addition to Moore's suggestion of Casey as a possible candidate for PMG, the Inspectors were also aware during their investigation that certain government officials had also recommended Casey for PMG. For example, Carla Hills, who was then the U.S. Trade Representative, recommended Casey's name to certain members of Congress, as well as to Donald Regan, the White House Chief of Staff in the Reagan Administration. Ex. 22, McIntosh Dep. at 262-63; 276-

77; 3 11; Ex. 150, SMFC4 10582-84, 4/02/86 Hills Interview Memorandum at 10583.

150. On January 6, 1986, the BOG voted unanimously to approve the appointment of Albert V. Casey as the new PMG. Ex. 35, SMFC4 00004-147, "Details of Offense at SMFC4 00105; Ex. 24, Hartman 05/07/98 Dep. at 223-25. "[T]he Board of Governors was pleased with the recommendation of Casey and acted quickly to appoint him by a unanimous decision." *Recognition Equip.*, 725 F. Supp. at 600; Ex. 26, Trial Tr. at 2503.

151. The Inpectors had no evidence that Moore or anyone else at REI exercised any influence over any members of the BOG to cause them to vote for Casey as the new Postmaster General. Nor was there any evidence "that Moore had any reason to believe the Board of Governors, which had the responsibility for appointing the PMG, would not exercise its responsibility independently." *Recognition Equip.*, 725 F. Supp. at 600.

152. "Carlin [was] fired for reasons independent of the [Voss/Gnau] conspiracy and by individuals other than the coconspirators." *Recognition Equip.*, 725 F. Supp. at 599.

The Investigation of Moore and REI

153. United States Postal Inspectors report to USPS management. *Moore v. Valder*, 65 F.3d 189, 196 (D.C Cir. 1995), cert. denied, 117 S. Ct. 75 (1996); Ex. 21, Edwards Dep. at 349; Ex. 24, Hartman 5/07/98 Dep. at 188-91.

154. The postal Inspectors who participated in the investigation of Moore and REI included, among others, Inspectors Hartman, Kormann, Edwards, Har-

rington, McIntosh and Robbins. From at least mid-1986 through the completion of the criminal trial, Hartman and Kormann played lead roles on the investigation team. Ex. 24, Hartman 5/07/98 Dep. at 17-18, 96-97, 173; Ex. 41, Kormann Dep. at 20-21, 23, 120-21, 138-39; Ex. 21, Edwards Dep. at 342-43, 500-01; Ex. 22, McIntosh Dep. at 151-52, 154-56; Ex. 100, Robbins Dep. at 24.

155. Unlike other cases that they had worked on, the Inspectors reported directly to Chief Postal Inspector Charles Clauson in connection with their investigation of Moore and REI. Ex. 24, Hartman 5/07/98 Dep. at 89, 193-96, 197; Ex. 21, Edwards Dep. at 3233; Ex. 20, Clauson Dep. at 131-32; Ex. 151, 10/10/96 Declaration of Charles Clauson, 15; Ex. 152, SMFC3 004916-28, 8/04/89 "Personal" note from Inspectors to Clauson re: status of REI case.

156. The Inspectors had an unlimited budget in connection with their investigation of Moore and REI. Ex. 24, Hartman 5/08/98 Dep. at 347; Ex. 21, Edwards; Dep. at 29.

157. Over 200 grand jury subpoenas were issued in the criminal case against Moore. Ex. 24, Hartman 7/07/00 Dep. at 28; Ex. 41, Kormann Dep. at 105; Ex. 105, Valder Dep. at 596-97; Ex. 91, SMFC3 13144-78, Inspectors' subpoena service and compliance report (master list). The Inspector drafted and prepared the subpoenas on behalf of the U.S. Attorney's office. Ex. 24, Hartman 7/07/00 Dep. at 31-32; Ex. 105, Valder Dep. at 77-78.

158. During their investigation, the Inspectors subpoenaed records from REI relating to, among other things, "the arrangement of interviews with journalists

and reporters," "meetings with United States Congressmen," "meetings with or regarding the REI Political Action Committee," "a summary of all contributions to candidates and or holders of public office," "authorization for individual PAC disbursements," and "disbursement of PAC funds to include the contributors' and payees' name." Ex. 153, Subpoena dated 7/24/86 for REI PAC contributions (SMFC3 09279-82) and 2/09/87 re: REI political activities (SMFC3 09157-59).

159. The key issue during the investigation of Moore and REI was whether they had any knowledge about the kickback scheme between Voss and Gnau. Ex. 41, Kormann Dep. at 132, 497; Ex. 154, SMTC3 01869-73, 04/13/87 Kormann notes of conference call to Ellen Huvelle at SWC3 01869-70.

160. During their investigation, the Postal Inspectors had no direct evidence that Moore or anyone else at REI was aware of payment scheme between Gnau and Voss. *Recognition Equip.*, 725 F. Supp. at 596; Ex. 41, Kormann Dep. at 136-37; Ex. 105, Valder Dep. at 425-26, 629.

161. "All of the unindicted co-conspirators who testified at [Moore's criminal] trial expressly stated that they never told Moore or Reedy about the payments from Gnau to Voss." *Recognition Equip.*, 725 F. Supp. at 596. *See also* Ex. 41, Kormann Dep. at 132-36; Ex. 24, Hartman 05/08/98 Dep. at 415; Ex. 36, SMFC3 09861-64, Arguments for Indicting the Corporation" at SMFC3 09863, ¶ 1b. John Gnau, for example, testified that he never told Moore, Reedy, or anyone else at REI about the payment scheme. Ex. 26, Trial Tr. at 306, 405, 562, 583; see also Ex. 155, DOJ23 001808-18, Kormann notes of 10/09/86 Gnau interview at DOJ23 001816 ("JG did not tell Reedy about JG payments to PV").

William Spartin, Michael Marcus and Sharon Peterson similarly testified that they did not tell Moore or anyone at REI about the payment scheme between Gnau and Voss. Ex. 26, Trial Tr. at 817, 2049, 2657, 2706.

162. In addition to the fact that none of the participants in the Voss/Gnau payment scheme ever told Moore or anyone else at REI about the payments to Voss, the Inspectors learned during their investigation that Gnau and Voss were concealing other information from REI as well. For example, Gnau concealed the fact that it was Voss—and not Gnau—who arranged for GAI to meet with Paul Carlin in early January 1985 in order to impress REI with Gnau's abilities to get the job done. *Recognition Equip.*, 725 F. Supp. at 591; Ex. 26, Trial Tr. at 655-57, 704. Similarly, Gnau concealed the disappointing results of his meeting with Carlin in January 1985 and instead tried to persuade REI that an OCR contract could be secured in 90-120 days. *Recognition Equip.*, 725 F. Supp. at 591. And when Moore, Reedy, and Bray confronted Gnau in April/May 1986 about whether he had done anything illegal with Voss, Gnau expressly denied any wrongdoing or making any payments to Voss and covered up his actions in an effort to shield the fact that Voss was "on the payroll" and to keep GAI's contract with REI in place. Ex. 26, Trial Tr. at 561-62, 691, 769, 1807.

163. Peter Voss was a central figure in the conspiracy scheme relating to the OCR procurement matters. The government, however, did not call Voss to testify against Moore or REI at the criminal trial. *Recognition Equip.*, 725 F. Supp. at 593-94; Ex. 24, Hartman Dep. at 133.

164. During their investigation, the Inspectors were repeatedly told by Voss, Gnau, Spartin, Marcus

and Peterson that none of them ever told Moore or anyone else at REI about the payment scheme between Gnau and Voss. Ex. 24, Hartman 5/07/98 Dep. at 132, 134-36, 249, 254-59, 269,5/0 3/98 Dep. at 535-36 and 4/20/00 Dep. at 239-41; Ex. 41, Kormann Dep. at 132-36, 516-19, 576, 580, 583, 590-607, 794; Ex. 21, Edwards Dep. at 119-20, 526; Ex. 22, McIntosh Dep. at 185-86 Ex. 26, Trial Tr. at 306, 405, 562, 583, 817, 2657-60, 2706, 2718-19; Ex. 52, Spartin Polygraph; Ex. 156, SMFC4 10782-96, 5/15/86 Peterson Interview, Memorandum at SMFC4 10791; Ex. 36, SMFC3 09861-64, "Arguments for Indicting the Corporation" at SMFC3 09863, ¶ 1b.

165. During their investigation, the Inspectors interviewed Spartin more than 20 times between March 1986 and September 1987. Ex. 26, Trial Tr. at 2590-2607. During these interviews, Spartin repeatedly told the Inspectors that he had never told anyone at REI about the payments to Voss and that he was not aware of anyone else ever telling anyone at REI about the payment scheme. *Id.* at 2657-60, 2718-19.

166. As part of the grand jury investigation, the Inspectors prepared witness statements for Frank Bray, Willian Spartin, Sharon Peterson, Peter Voss, John Gnau and Michael Marcus that were presented to the grand jury as part of each respective witness's testimony. Ex. 157, 10/16/86 (DOJ29 000496-511) and 11/17/87 (WM 002619-26) Gnau Grand Jury Tr. at DOJ29 000501-02; Ex. 55, SMFC3 06614-30, 9/19/86 Peterson Grand Jury Tr. at SMFC3 06621-22; Ex. 158, WM 016678-92, 8/28/86 Voss Grand Jury Tr. at WM 016684-86; Ex. 159, 4/25/86 (WM 004171-77), 10/23/86 (WM 004178-90), and 11/17/87 (WM 003816-21) Grand Jury Tr. (Marcus) at WM 004184-85; Ex. 109, DOJ 28 000183A-229, 9/01/87 Grand Jury Tr. (Spartin) at DOJ28

000188; Ex. 78, SMFC3 01414-526, 7/16/87 Grand Jury Tr. (Bray) at SMFC3 01419-20; Ex. 41, Kormann Dep. at 101, 494, 563-64. The Inspectors understood at the time these statements were prepared that the statements would be presented to the grand jury as part of the witnesses' testimony. Ex. 41, Kormann Dep. at 569-71; Ex. 24, Hartman 05/07/98 Dep. at 241, 244-47.

167. Inspectors Hartman and Kormann specifically discussed and agreed with Valder that witness statements should be prepared and presented to the grand jury. Ex. 41, Kormann Dep. at 519-21. In addition, it was common knowledge among the Inspectors working on the case that witness statements were being prepared for presentation to the grand jury. *Id.* at 520.

168. Prior to their participation in the Moore investigation, none of the Inspectors had ever been involved in a case where witness statements were prepared by the postal Inspectors and presented to the grand jury. Similarly, none of the Inspectors participated in any case after the Moore investigation where witness statements were prepared and presented to the grand jury. Ex. 24 Hartman 5/07/98 Dep. at 272-73; Ex. 41, Kormann Dep. at 520; Ex. 21, Edwards Dep. at 139. 373-77; Ex. 26, Trial Tr. at 3478-79 (Harrington testimony).

169. Inspectors Hartman and Kormann decided what information would be put into the drafts of the witnesses' grand jury statements and what information would be left out. Ex. 24, Hartman 05/07/98 Dep. at 262; Ex. 26, Trial Tr. at 3779.

170. None of the witness statements that were prepared by the Inspectors and presented to the grand

jury contained any statement to the effect that neither Moore nor anyone else at REI had been told about the payment scheme between Gnau and Voss. Ex. 41, Kormann Dep. at 491-99, 509, 516-19, 522-26, 590-607; Ex. 24, Hartman 5/07/98 Dep. at 248-50, 264-69; Ex. 39, DOJ23 001681-702, Gnau Statement; Ex. 106, DOJ28 000155-82, Spartin Statement; Ex. 160, SMFC3 13669-87, 10163-201, Grand Jury "Statement of Peter Voss" (hereafter "Voss Statement"); Ex. 161, SMFC3 13865-76, Grand Jury "Statement of Sharon Peterson" (hereafter "Peterson Statement"); Ex. 69, SMFC3 10034-57, Marcus Grand Jury Summary; Ex. 162, SMFC3 02048-71, Grand Jury "Statement of Frank Bray" (hereafter "Bray Statement"). Instead, each of the statements intentionally omitted this exculpatory information.

171. Neither Voss, Gnau, Marcus, Spartin nor Peterson was asked any questions during their grand jury testimony to elicit the fact that none of them had told either Moore or anyone else at REI about the payment scheme between Voss and Gnau. Ex. 158, WM 016678-92, 8/28/88 Voss Grand Jury Tr.; Ex. 157, 10/16/86 (DOJ29 000496-511) and 11/17/87 (WM 002619-26) Gnau (Grand Jury Tr.; Ex. 159, 4/24/86 (WM 004171-77), 10/23/86 (WM 004178-90), and 11/17/87 (WM 003816-21) Marcus Grand Jury Trs.; Ex. 109, DOJ28 000183A-229, 9/01/87 Spartin Grand Jury Tr.; Ex. 55, SMFC3 06614-30, 9/19/86 Peterson Grand Jury Tr.; Ex. 26, Trial Tr. at 2708-09.

172. When Inspector Hartman testified to the grand jury to summarize the "real important pieces of evidence" from the investigation, he never told the grand jury that none of conspirators had told either Moore or anyone else at REI about the payment scheme between Voss and Gnau. Ex. 24, Harman

05/07/98 Dep. at 253-55, 269-271 and 05/08/98 Dep. at 419-20.

173. Valder's and the Inspectors' failure to present the exculpatory evidence from Voss, Gnau, Marcus, Spartin and Peterson was contrary to the policies in existence at the United States Attorney's Office at the time of the grand jury investigation of Moore and REI. The United States Attorney's Manual in existence at that time specifically provided that "[w]hen a prosecutor conducting a Grand Jury inquiry is personally aware of substantial evidence which directly negates the guilt of the subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the Grand Jury before seeking an indictment against such person." See United States Attorney's Manual at § 9-11.2333 (1988).

174. The Inspectors understood at the time of their investigation of Moore and REI that they had an obligation as postal Inspectors to make sure that information that was being prepared for presentation to the grand jury was complete and impartial so that the grand jury could properly decide whether to issue an indictment. Ex. 41, Kormann Dep. at 516; Ex. 24, Hartman 5/07/98 Dep. at 245

175. The Inspectors understood at the time of their investigation of Moore and REI that they had an obligation as postal Inspectors to make sure that relevant evidentiary material was included in the information that was being prepared for presentation to the grand jury. Ex. 41, Kormann Dep. at 517.

176. The Inspectors understood at the time of their investigation of Moore and REI that they had an obligation as postal Inspectors to be fair and impartial

in their preparation of information for presentation to the grand jury. Ex. 41, Kormann Dep. at 516, Ex. 21, Edwards Dep. at 65, 148-49, 320-2; Ex. 24, Hartman 5/07/98 Dep. at 245.

177. The Inspectors understood at the time of their investigation of Moore and REI that it would not be fair to give the grand jury incomplete information about the circumstances relating to the matter under investigation. Ex. 41, Kormann Dep. at 509, 518-19.

178. The Inspectors understood at the time of their investigation of Moore and REI that they had an obligation as postal Inspectors to make sure that relevant evidentiary material was included in any witness statements that were prepared during their investigation. Ex. 41, Kormann Dep. at, 8, 69.

179. The Inspectors understood at the time of their investigation of Moore and REI that a "witness statement" is the statement of the witness and not the statement of the postal Inspectors. The Inspectors also understood that if the witness and the Inspectors disagreed about what the facts should be, the witness's version of the facts was supposed to be contained in the statement. Ex. 41, Kormann Dep. at 69-70, 608-09; Ex. 26, Trial Tr. at 3479, 3492 (Harrington testimony); Ex. 21, Edwards Dep. at 137-38.

180. The Inspectors understood at the time of their investigation of Moore and REI that communicating with members of Congress on matters of public concern is a constitutionally protected right that every citizen enjoys and that citizens cannot be prosecuted for exercising such rights. Ex. 41, Kormann Dep. at 67-68, 178-81; Ex. 24, Hartman 5/08/98 Dep. at 355 and 4/20/00 Dep. at 76-79; Ex. 21, Edwards Dep. at 208-12, 549; Ex.

22, McIntosh Dep. at 148-50; Ex. 100, Robbins Dep. at 96-97.

181. The Inspectors understood at the time of their investigation of Moore and REI that criticizing public officials on matters of public concern is a constitutionally protected right that every citizen enjoys and that citizens cannot be prosecuted for exercising such rights. Ex. 41, Kormann Dep. at 66-67; Ex. 24, Hartman 5/07/98 Dep. at 162-63 and 4/20/00 Dep. at 76-79; Ex. 21, Edwards Dep. at 64 65; Ex. 22, McIntosh Dep. at 149-50, 434-35; Ex. 100, Robbins Dep. at 96-97.

182. The Inspectors understood at the time of their investigation of Moore and REI that that it was a violation of grand jury secrecy rules to share the grand jury testimony and exhibits of one witness with another witness who was going to appear before the grand jury. Ex. 100, Robbins Dep. at 47-48; Ex. 24, Hartman 5/07/98 Dep. at 50-53, 64-65, 178, 311-12 and 5/08/98 Dep. at 453-55, 458-59; Ex. 41, Kormann Dep. at 42-43, 170-72, 543-44; 555-56; Ex. 22, McIntosh Dep. at 127-29; Ex. 21, Edwards Dep. at 59.

183. On April 8, 1986, Inspectors Edwards and Harrington made an unannounced visit to REI for the purpose of serving a grand jury subpoena on the company. Ex. 21, Edwards Dep. at 107-08, 298-99, 303, 484-86; Ex. 26, Trial Tr. at 3468 (Barrington testimony). According to Inspector Edwards, REI was already a focus of the investigation at that point. Ex. 21, Edwards Dep. at 303.

184. Instead of serving the subpoena when they first arrived at REI on April 8, 1986, Edwards and Harrington asked to visit with Frank Bray. They did not disclose to Bray at that time that they were there

to serve a subpoena, but instead proceeded to engage in a "heavyhanded" treatment of Bray, during which Edwards raised his voice and forcefully told Bray that people would be going to jail and that he better "get on the bus" before it leaves the station. Bray did not refuse to answer any of the Inspectors' questions during this interview, and as far as Edwards' was concerned, Bray was being truthful in his responses. Ex. 26, Trial Tr. at 3346, 3348-50, 3363; Ex. 21, Edwards Dep. at 305-18; Ex. 51, SMFC3 00226-29, 4/08/86 Reedy/ Loose Interview Memorandum at SMFC3 00231-34; *Recognition Equip.*, 725 F. Supp. at 595.

185. According to Inspector Harrington, who was the second in command at the Inspection Service and a veteran of thirty-two years, Edwards' treatment of Bray on April 8, 1986 was inappropriate. Ex. 26, Trial Tr. at 3446, 3467; *Recognition Equip.*, 725 F. Supp. at 595.

186. After their meeting with Bray in the morning of April 8, 1986, Edwards and Harrington left REI without having served the grand jury subpoena they had brought with them. They returned later in the day and met with Robert Reedy and Thomas Loose, REI's general counsel, and served the subpoena at that time. During this meeting, Reedy and Loose complained about the "heavy-handed" treatment of Bray earlier in the day and, based on an experience that REI had with the inspection service in the 1970's, charged that the investigation was "a contrivance to set up [REI] because REI was right on the verge of delivering a machine out in Phoenix to be tested . . . So there was a feeling that we were there, in some way, to preclude REI from competing." This led the Inspectors to believe that REI might file suit against the USPS.

Ex. 26, Trial Tr at 3351-53, 3364-65; *Recognition Equip.*, 725 F. Supp. at 595; Ex. 51, SMFC3 00226-29, 4/08/86 Reedy/Loose Interview Memorandum; Ex. 163, SMFC3 0022324, Barrington notes of Reedy/Loose interview; Ex. 21, Edwards Dep. at 108, 277, 317-21, 48586.

187. In the Fall of 1985, the Inspectors learned that Moore had a discussion with William Chapp on October 9, 1985, during which Moore asked Chapp what he (Moore) could do to help the USPS with the OCR procurement. In response, Chapp urged Moore to "get the media and Congressmen off of our (the Postal Service's) back." Ex. 164, SMFC4 10277-78, 1985 Hartman notes of Chapp interview at SMFC4 10278; Ex. 49, Moore Dep. at 299-300; Ex. 165, SMFC4 10437-49, 12/18-19/85 Currie Boswell Interview Memorandum at SMFC4 10447; Ex. 166, SMFC4 10279-86, undated Hartman notes of Chapp Interview; Ex. 24, Hartman 04/20/00 Dep. at 26-34; Ex. 2 , Edwards Dep. at 166-67.

188. On October 24, 1986, AUSA Valder and as many as 10 postal Inspectors, including Edwards, Hartman, Kormann and McIntosh, surrounded Spartin at the U.S. Attorneys' office in a "bizarre" meeting that went from "bad to worse." Ex. 26, Trial Tr. at 2546, 2595-96, 2727-28; Ex. 21, Edwards Dep. at 121-27, 134; Ex. 105, Valder Dep. at 336; Ex. 41, Kormann Dep. at 417, 426; Ex. 24, Hartman 5/07/98 Dep. at 120-25 and 4/20/00 Dep. at 53-54; Ex. 22, McIntosh Dep. at 194. According to Spartin, this was a "terrifying moment." Ex. 26, Trial Tr. at 2595.

189. Prior to their meeting with Spartin on October 24, 1986, Valder met with the postal Inspectors and agreed to a plan in which Valder was going to rip up a copy of Spartin's immunity agreement during the

meeting. Ex. 41, Kormann Dep. at 421, 426; Ex. 24, Hartman Dep. at 124, 148-49; Ex. 22, McIntosh Dep. at 197; Ex. 105, Valder Dep. at 336; Ex. 167, Valder's Answer to Complaint dated 10/22/96. During the actual meeting with Spartin, voices were raised, and Valder did in fact tear up a copy of Spartin's immunity agreement. Ex. 105, Valder Dep. at 336, 338, 342-13; Ex. 41, Kormann Dep. at 426; Ex. 24, Hartman 5/07/98 Dep. at 120-25 and 4/20/00 Dep. at 53-54; Ex. 21, Edwards Dep., at 126-27, 135.

190. According to Inspector Hartmen, the incident of ripping up a copy of Spartin's immunity agreement was a tactic designed to exert some "influence" over Spartin. Ex. 24, Hartman 04/20/00 Dep. at 55-56.

191. Spartin was aware at the time that his immunity agreement was ripped up that Voss had just been sentenced to a four year prison term within the preceding week. Ex. 26, Trial Tr. at 2730.

192. The preplanned incident in which Valder ripped up a copy of Spartin's immunity agreement was not a typical practice of the Inspectors or the prosecutor. In fact, the inspectors had never witnessed or participated in such a tactic either before or after the Moore investigation. Ex. 41, Kormann Dep. at 60, 427-28; Ex. 21, Edwards Dep. at 135; Ex. 24, Hartman 5/07/98 Dep at 145-46; Ex. 22, McIntosh Dep. at 200-01. Valder similarly admitted that the Moore case was the one and only time that he engaged in the tactic of physically ripping up a witness' immunity agreement. Ex. 105, Valder Dep. at 686.

193. At the time of the October 24, 1986 meeting with Spartin, Valder and the Inspectors were

aware that Spartin was suffering from a heart condition and that he had been under psychiatric care for several months. Ex. 52, Spartin Polygraph at 3, 8-11; Ex. 168, SMFCI 19478-517, 9/86 BOG Meeting Tr. at SMFC1 19502-03, 19506-07, (Clauson reported to the BOG in September 1986 that "[w]e're in a very sensitive period of negotiations with several people, some of them keep having heart attacks. . . .").

194. Shortly after the meeting on October 24, 1986, Spartin was shown the grand jury statement of his coconspirators that had been scripted by the Postal Inspectors and previously presented to the grand jury as part of the witnesses' testimony. Ex. 26, Trial Tr. at 2550-54, 2561, 2609 2727-37; Ex. 41, Kormann Dep. at 4413-49, 482-85; Ex. 24, Hartman 05/07/98 Dep. at 310-11; Ex. 52, Spartin Polygraph at 14, 16, 18, 19, 22, 28, 33; Ex. 169, SMFC3 10018-76, Compilation of statements shown to Spartin (a/k/a "Exhibit 707"). Inspectors Hartman and Kormann agreed with Valder that this information should be provided to Spartin, and they were aware at that time that Spartin was being provided with these grand jury materials. Ex. 41, Kormann Dep. at 448-50, 539-40, 556 (indicating that Hartman, Kormann and Valder were an integral part of the process that led to giving Spartin the grand Jury statements of other witnesses); Ex. 105, Valder Dep. at 376-77 ("***we*** gave [Spartin] parts of summary statements"), 421 ("***The Inspectors and I*** were religious in not letting, [Spartin] know what other uses those documents had been put to . . ."); Ex. 24, Hartman 05/07/98 Dep. at 313-14, 316-17 and 05/08/98 Dep. at 503; Ex. 52, Spartin Polygraph at 14, 16, 18, 19, 22, 28, 33. In fact, Inspector Kormann specifically testified that, with respect to the grand jury statements of Gnau and Marcus, "***my***

recollection is that is something that we would have given [Spartin] and, based on what he says here in this polygraph transcript, we probably did." Ex. 41, Kormann Dep. at 539-40 (emphasis added). In addition, Spartin testified during the criminal trial that both Valder and the Inspectors were involved in providing him with the grand jury statements of other witnesses. Ex. 26, Trial Tr. at 2730.

195. Spartin understood at the time he reviewed the grand jury statements that he was in fact looking at the grand jury statements of others who had already appeared before the grand jury. Ex. 52, Spartin Polygraph at 14, 16, 18, 19, 22, 28, 33.

196. After being provided with the grand jury statements of other witnesses, Spartin's view of the facts became tainted and "colored." In fact, Spartin later admitted that "[w]hat colors a lot of this is that I read the testimony of those guys and I was appalled when I read it, because it bothers me now. Some of the things that were going on that I didn't know about." Ex. 52, Spartin Polygraph at 14. Spartin also admitted that "[y]ou see my confusion here is what I'm reading now and what I understand was different at the time I was telling the Inspectors." *Id.* at 19. This confusion led Spartin to implicate Moore and REI even though Spartin had no personal knowledge that Moore was aware of the Voss/Gnau payment scheme:

> ROBBINS: Do you have any knowledge about whether anyone in REI knew Peter Voss was involved in this scheme to get them the sole source contract? or was being paid?
>
> SPARTIN: Let me answer you this way. Being paid, no sir, I don't. I have no knowledge of

> that at all. Peter Voss being part of the deal, no knowledge. ***But you know, I read that goddamn testimony and I'm not a lawyer but Jesus, there's enough there to seem to me to hang REI from the yardarm.***

Id. at 28 (emphasis added).

197. On December 5, 1986, William Spartin was given a polygraph examination that was administered by Inspector Robbins. Ex. 52, Spartin Polygraph; Ex. 26, Trial Tr. at 2597-99. The purpose of the polygraph was principally two-fold: to determine (1) whether Spartin had any personal knowledge of whether REI had been told about or was aware of the payments being made to Voss, and (2) whether Spartin had planned with anyone to withhold or conceal any information from the investigators. Ex. 100, Robbins Dep. at 27-28, 58; Ex. 41, Kormann Dep. at 478.

198. Spartin asked the postal Inspectors to administer the polygraph examination so that he could convince them that he was telling the truth with respect to, among other things, his lack of knowledge concerning Moore's and REI's knowledge of the Voss/Gnau payment scheme. Ex. 26, Trial Tr. at 2722-23.

199. Inspector Robbins did not identify himself as a postal inspector until near the end of the polygraph examination, and Spartin was surprised to learn that Robbins was an inspector. Ex. 26, Trial Tr. at 2723-24; Ex. 52, Spartin Polygraph at 37.

200. During his polygraph examination, Spartin stated approximately 19 times that, to his knowledge, Moore and REI were never told about and were not aware of the Voss/Gnau payoff scheme. Ex 52,

Spartin Polygraph at 16, 19, 20, 28, 315, 40, 43, 45, 48, 49, 50.

201. Spartin's polygraph examination showed that Spartin was being truthful when he said 19 times that he had no knowledge of anyone at REI being told about or being aware of the payoffs to Voss. He was also being truthful when he said that he had not agreed with anyone to conceal any facts or information from the investigators. Ex. 100, Robbins Dep. at 71, 72-73, 83-84; Ex. 41, Kormann Dep. at 480-81.

202. As a result of Spartin's polygraph examination, Inspector Robbins concluded that Spartin had no personal knowledge of Moore or anyone else at REI being aware of the Voss/Gnau payoff scheme. Ex. 100, Robbins Dep. at 87; Ex. 41, Kormann Dep. at 49394.

203. During Spartin's polygraph examination, Inspector Robbins recognized that Spartin was exasperated because he (Spartin) kept telling the Inspectors that he did not know anything about REI having knowledge of the payoffs and noone would belief him and just kept "beating him up" on that issue. In fact, Inspector Robbins recalls Spartin in essence telling him, "I've told them what I know and they just won't accept what I'm telling them, and they want me to say something different." Robbins Dep. at 83. In this regard, Spartin stated during his polygraph: "But I, what confuses me is that everyone is beating me up on this issue of [REI's and Moore's knowledge] and I don't know what people want. I tell them but if they would talk to my attorney and tell my attorney, my attorney could tell me, then I could tell you the answers they want. I don't know." Ex. 52, Spartin Polygraph at 20; Ex. 41, Kormann Dep. at 549-50.

204. During his polygraph examination, Spartin expressed concern that the postal Inspectors had threatened to implicate and indict Spartin's son in the conspiracy scheme. Ex. 26, Trial Tr. at 2599. In fact, Spartin complained to Robbins that "I thought they [Valder and the Postal Inspectors] played a dirty game with me because they tried to get my son involved . . . That truly troubles me because what they tried to tell me was look, Spartin, you are in deep trouble. You have lied to us. We are going to charge him with obstruction of justice and we talked about that." Ex. 52, Spartin Polygraph at 51; Ex. 26, Trial Tr. at 2602-04; Ex. 41, Kormann Dep. at 557-60.

205. During his polygraph examination, Spartin acknowledged that he had every incentive—and no disincentive—to implicate Moore in the payment scheme if he could. Still, Spartin acknowledged that he could not do so: "I don't give a hoot and hell about Bill Moore . . . . Boy would I tell you [if I knew something on REI], I got nothing to lose. It's stupid not to tell . . . but I can't make up a story." Spartin also stated that "I wish I could give them REI . . . and I'll be damned if I can do it, and I'm not gonna lie." Ex. 52, Spartin Polygraph at 22, 49, 36.

206. During Spartin's polygraph examination, Inspector Robbins became aware that Spartin had been provided with the grand jury witness statements and testimony of other witnesses who had appeared before the grand jury. Ex. 100, Robbins Dep. at 76-77.

207. Inspector Robbins understood at the time of Spartin's polygraph examination that it was a violation of grand jury secrecy rules to share the grand jury testimony and exhibits of one witness with another

witness who was going to appear before the grand jury. *Id.* at 47-48.

208. After learning that Spartin had been provided with the grand jury testimony and statements of other grand jury witnesses, Inspector Robbins did not do any follow-up or question any of the other Inspectors as to why Spartin had been provided with such information. *Id.* at 77-78.

209. During the grand jury proceedings, Valder, Hartman and Kormann met with William Hittinger prior to Hittinger's testimony before the grand jury. Ex. 41, Kormann Dep. at 329-36. During that meeting, Valder commented that "whether the persons (involved) in this case were guilty or not did not concern him" and that Valder's motivation in this case was to get a high profile conviction "to get a track record or some notoriety which would help him obtain a good position in private practice." Ex. 170, Affidavit of William C. Hittinger, dated 3/28/92, ¶ 6; Ex. 171, Hittinger Dep. at 27-28; Ex. 105, Valder Dep. at 177-83. Neither Hartman nor Kormann repudiated or disavowed Valder's declaration. Ex. 171, Hittinger Dep. at 27-28.

210. During August 1987, Spartin met with Inspectors Hartman and Kormann to prepare for his grand jury testimony. During this meeting, Hartman and Kormann showed Spartin various documents and asked Spartin whether he would give an opinion that Moore and Reedy knew about the payment scheme between Voss and Gnau. Ex. 109, DOJ28 000183A-229, 9/01/87 Spartin Grand Jury Testimony at DOJ28 000192. Based on Spartin's polygraph examination, as well as Spartin's prior interviews during the investigation, Hartman and Kormann knew that such an opin-

ion was directly contrary to Spartin's own personal knowledge. Hartman and Kormann also knew—or under the circumstances should have known—that Spartin's "opinion" was based on the grand jury witness statements that Spartin had been shown.

211. Based on the results of Spartin's polygraph examination, Inspector Robbins concluded that he would not have asked Spartin to give an opinion before the grand jury that was contrary to Spartin's own personal knowledge. Ex. 100, Robbins Dep. at 86-88.

212. During the grand jury proceedings, Valder made it clear to the grand jury that Spartin was a central witness in the government's case against Moore and REI. Ex. 172, DOJ1 000642-51, 7/15/86 Grand Jury Tr. at DOJ1 000644 (Valder's comments to the grand jurors); Ex. 173, DOJ1 00680-87, 11/20/86 Grand Jury Tr. at DOJ 000681 (Valder's comments); Ex. 107, DOJ1 000540-64, 3/19/87 Grand Jury Tr. at DOJ1 00060-61 (Valder's comments); Ex. 174, DOJ1 000565-71, 6/04/87 Grand Jury Tr. at DOJ1 000568 (Valder's comments); Ex. 175, DOJ1 000578-92, 9/01/87 Grand Jury Tr. at DOJ1 000579-82, 000585-86 (Valder's comments).

213. On September 1, 1987, Spartin testified before the grand jury. Ex. 109, DOJ28 000183A-229, 9/01/87 Spartin Grand Jury Tr. As part of Spartin's testimony, his witness statement that had been prepared by the Inspectors was read to the grand jury and was offered as an exhibit for the grand jury's consideration. *Id.* This statement intentionally omitted any information to the effect that Spartin had no knowledge of whether Moore or anyone else at REI was aware of the payment scheme between Voss and

Gnau. Ex. 106, DOJ28 000155-82, Spartin Statement; Ex. 41, Kornmann Dep. at 496-97, 504-05, 521-25.

214. Spartin's grand jury witness statement was principally drafted by Inspectors Hartman and Kormann. Ex. 41, Kormann Dep. at 521.

215. Spartin was not asked during his grand jury testimony whether he had any personal knowledge of Moore or anyone else at REI being aware of the kickbacks to Peter Voss. Ex. 109, DOJ28 000183A-229, 9/01/87 Spartin Grand Jury Tr. Instead, Valder elicited an "opinion" from Spartin that Moore and Reedy knew about the Voss/Gnau payment scheme. *Id.* at 10. This "opinion" was the same opinion that the Inspectors had worked with Spartin to develop in August 1987 in preparation for Spartin's testimony. *Id.* In addition, this "opinion" was directly contrary to Spartin's own personal knowledge that, as far as he was aware, Moore and Reedy did not know about the payment scheme.

216. According to Inspector Kormann, the failure to present the grand jury with Spartin's lack of personal knowledge concerning Moore's and REI's alleged awareness of the payments to Voss would have been an incomplete presentation of the facts and would have been unfair and improper. Ex. 41, Kormann Dep. at 508-10, 527-29, 534-36. Kormann also admitted that leaving out relevant evidentiary information from the grand jury's consideration would not be fair and proper. *Id.* at 516-19.

217. Spartin was the only coconspirator/grand jury witness who testified that Moore allegedly knew about the Voss/Gnau payment scheme.

218. During the grand jury proceedings, Valder told the grand jury on November 20, 1986 and

again on December 4, 1986 that Spartin was going to be given a polygraph examination "and sometimes those break down a person's intentions to fabricate information. It's more of a psychological thing. The results will show whatever they show and whatever will happen will happen." Ex. 173, DOJ1 000680-87, 11/20/86 Grand Jury Tr. at DOJ1 000681; Ex. 176, DOJ1 000688-92, 12/04/86 Grand Jury Tr. at DOJ1 000689. Despite this revelation, however, neither Valder nor the Inspectors ever presented the grand jury with the results of the polygraph examination or the fact that Spartin had admitted 19 times during the polygraph that he had no knowledge of Moore or anyone at REI being aware of the Voss/Gnau payment scheme.

219. On October 10, 1986 John Gnau testified before the grand jury. Ex. 157, DOJ29 000496-511, 10/16/86 Gnau Grand Jury Tr. As part of Gnau's testimony, his witness statement that had been prepared by Inspectors Hartman and Kormann was read to the grand jury and was offered as an exhibit for the grand jury's consideration. *Id.*; Ex. 41, Kormann Dep. at 563-64. This statement did not contain any information to the effect that Gnau never told Moore or anyone else at REI about the payment scheme between Voss and Gnau. Ex. 39, DOJ23 001681-702, Gnau Statement; Ex. 41, Kormann Dep. at 590-607. Nor did the statement contain any context for the quotes that were allegedly attributable to Reedy. Ex. 26, Trial Tr. at 404-05, 557, 588, 590-91, 601, 604-05, 606-611.

220. During their investigation, the Inspectors had no evidence that Moore was aware of the discussions concerning "our friend" and "it's better that you not know what my arrangement is with Voss" that allegedly occurred between Gnau and Reedy as set

forth in Gnau's grand jury statement. The Inspectors similarly had no evidence that Gnau ever had any conversation with Moore in which Gnau said that "it's better that you not know what my arrangement is with Voss." Ex. 41, Kormann Dep. at 580.

221. On July 16, 1987 Frank Bray testified before the grand jury. Ex. 78, SMFC3 01414-1526, 7/16/87 Bray Grand Jury Tr. As part of Bray's testimony, his witness statement that had been prepared by Inspectors Hartman and Kormann was read to the grand jury and was offered as an exhibit for the grand jury's consideration. *Id.*; Ex. 41, Kormann Dep. at 612-13; Ex. 177, DOJ27 000211-32, Grand Jury Summary of Bray testimony; Ex. 178, Inspectors' notes of 6/09/87 (SMFC3 01754-83) and 7/14/87 (SMFC3 01874-96) Bray interviews.

222. In preparation for Bray's grand jury testimony, the Postal Inspectors met with Bray and his attorneys to review and discuss Bray's grand jury statement. During these meetings, the Inspectors refused to allow Bray to make certain changes to his grand jury witriess statement, including adding a statement that, to Bray's knowledge, Moore was not involved in or aware of the kick-back scheme. Instead, the Inspectors insisted, after a marathon session that lasted until 1 or 2 a.m. the day before Bray's testimony, that their version of certain events be contained in the grand jury statement. Ex. 26, Trial Tr. at 1809-11, 1832-33, 1939, 1952 (Bray testimony); Ex. 41, Kormann Dep. at 620-24, 628-30, 646-64; Ex. 24 Hartman 5/07/98 Dep. at 272, 274-84 and 4/20/00 Dep. at 260-66. In Frank Bray's words, the Inspectors "controlled" the document, which Bray viewed as a "slanted" and "one-

sided" picture of what he had actually told the Inspectors. Ex. 26, Trial Tr. at 1810, 1832-33.

223. One of the fundamental points that Bray disagreed with the Inspectors was that Bray wanted a statement in his summary to the effect that Bray did not know that Voss was being paid by Gnau and that to his knowledge, neither did Moore or Reedy. The Inspectors refused to include any such statement in Bray's summary. *Id.* at 1939; Ex. 41, Kormann Dep. at 652-53; 661-62, 664.

224. As part of his grand jury statement, Bray wanted to include a final paragraph that related to Moore and Reedy. The Inspectors and Valder, however, refused to include the paragraph in Bray's statement, and Valder wrote and circled the words "don't reveal" under this paragraph in the draft statement. Ex. 179, DOJ6 000222-243, 7/16/87 Valder's Notes on Bray's Grand Jury Testimony at DOJ6 000243; Ex. 41, Kormann Dep. at 648-49, 651-52.

225. AUSA Valder and Inspectors Hartman and Kormann also attempted to coerce Bray into adopting the statement as they had drafted it by telling Bray that he would have to testify before the grand jury for "five to seven" days or "however long it takes." Ex. 26, Trial Tr. at 1824; Ex. 41, Kormann Dep. at 634-35.

226. In the course of negotiations with Bray and his attorneys over the content of Bray's grand jury statement, Valder and the Inspectors were presented with a list of questions that Bray wanted to have asked in the presence of the grand jury. Ex. 180, WM 031784-5, List of questions; Ex. 41, Kormann Dep. at 639-42. These questions were provided in an effort to elicit the

same type of information that Bray had asked to have included in his written statement, but which the Inspectors had refused to include. Ex. 26, Trial Tr. at 1943-44; Ex. 41, Kormann Dep. at 638-39, 642-43, 669-70; Ex. 105, Valder Dep. at 620. One of the questions specifically addressed the issue of Moore's knowledge of the kickbacks to Voss. Ex. 41, Kormann Dep. at 665.

227. When Bray appeared before the grand jury, Valder refused to ask Bray whether Moore was aware of the conspiracy. Ex. 26, Trial Tr. at 1943-44; Ex. 78, SFMC3 01414-526, 7/16/87 Bray Grand Jury Tr.; Ex. 41, Valder Dep. at 393-95, 449-51, 478-90, 617-21.

228. Inspector Harrington—who is now deceased—testified at the criminal trial that the Inspectors' tactic of refusing to let Bray change his statement was wrong and contrary to Inspection Service policy. Ex. 26, Trial Tr. at 3346, 3348-50, 3363, 3446, 3467.

229. As part of their investigation of REI and Moore, the Postal Inspectors prepared a document entitled "Details of the Offense." Ex. 35, SMFC4 00004-147, "Details of the Offense." This document was principally prepared by Inspectors Hartman and Kormann. Ex. 41, Kormann Dep. at 62-67, 743-46; Ex. 24, Hartman 4/20/00 Dep. at 104, 128, 130-31; Ex. 181, Defendants' Answers and Objections to Plaintiff's Fourth Set of Interrogatories, Answer No. 4.

230. The "Details of Offense" set forth the bases on which the postal Inspectors believed that Moore and REI should be indicted and prosecuted. Ex. 35, SMFC4 00004-147, "Details of Offense" at SMFC4 00009; Ex. 24, Hartman 4/20/00 Dep. at 114-15; Ex. 41, Kormann Dep. 164-65.

231. The "Details of Offense" concludes, in part, that "Moore's . . . intent to defraud the USPS is evident [because] . . . [o]n or about July 25, 1985, at Moore's and Reedy's suggestion and with their substantial input relative to its drafting, Congressman Frost proposed an amendment to a USPS appropriate (sic) bill that in effect would freeze USPS revenue until MLOCRs were purchased from REI." Ex. 35, SMFC4 00004-147, "Details of Offense" at SMFC4 00019. This alleged basis for prosecution was also referenced by Valder in his push to get the case indicted. Ex. 182, DOJOPR 000374-406, Valder's annotated version of the Knight/Leeper June 1, 1988 Memorandum at DOJOPR 000379-80 and DOJOPR 000406; Ex. 183, DOJOPR 000362-373, 6/01/88 Knight/Leeper Memo to USA Stephens; Ex. 184, DOB 01284-1318, 2/11/88 Valder Memo re: REI/Moore/Reedy Submission; Ex. 185, DOJ29 001290301, 04/15/88 Valder Memo.

232. The "Details of Offense" concludes, in part, that "Moore's . . . intent to defraud the USPS is evident [because] . . . [d]uring the period August 1985 to April 1986, REI continued to undermine the competitive testing program via the media and Congress." Ex. 35, SMFC4 00004-147, "Details of Offense" at SMFC4 00019; Ex. 24, Hartman 04/20/00 Dep. at 1131-33, 137-38. This alleged basis for prosecution was also referenced by Valder in his push to get the case indicted. Ex. 182, DOJOPR 000375-406, Valder's annotated version of the Knight/Leeper June 1, 1988 Memorandum at DOJOPR 000379-80 and 000406; Ex. 184, DOJ3 01284-1319, 2/11/88 Valder Memo re: REI/Moore/Reedy Submission; Ex. 185, DOJ29 001290301, 04/15/88 Valder Memo.

233. As evidence of Moore's supposed participation in the Voss/Gnau conspiracy, the Postal Inspectors noted in the "Details of Offense" that "REI lobbied several Congressmen to pressure USPS into purchasing equipment from REI. REI drafted letters which Congressmen sent to USPS. Reedy and Moore worked with Congressman Frost to draft an amendment to a USPS appropriations bill which, if passed, would have prevented release of funds to USPS until REI obtained a USPS contract." Ex. 35, SMFC4 00004-147, "Details of Offense" at SMFC4 00007.

234. As part of the "Details of Offense," the Inspectors identified Congressmen Jack Brooks and Martin Frost as "Key Players" in the Inspectors' case against Moore. *Id.* at SMFC4 00022-23.

235. The "Details of Offense" is peppered with references and analysis of Moore's contacts with Congressmen and the media in connection with the procurement of a postal service contract for REI. *Id.* at SMFC4 00007, 19, 22-23, 27, 28, 30, 34, 72, 81, 82, 86, 90.

236. During the investigation, Inspectors Hartman and Kormann prepared a document entitled "Arguments for Indicting the Corporation" that may have been shared with Inspector McIntosh as well. Ex. 41, Kormann Dep. at 163-64, 166., 728-29, 733; Ex. 24, Hartman 04/20/00 Dep. at 60-61, 107-08; Ex. 181, Defendants' Answers and Objections to Plaintiffs Fourth Set of Interrogatories. This document posits as the first reason for indicting REI the fact that the company and its Political Action Committee, wholly independent of the GAI kickback conspiracy, "funded a media and political campaign to discredit USPS management and cause financial harm to USPS, for example . . . (b) Frost amendment to freeze USPS

appropriations bill." Ex. 36, SMFC3 09861-64, "Arguments for Indicting The Corporation" at SMFC3 09861; Ex. 24, Hartman 04/20/00 Dep. at 70-78; Ex. 41, Kormann Dep. at 731. Former Chief Postal Inspector Clauson admitted that this is the type of First Amendment conduct that should not be used as a basis for seeking anyone's indictment. Ex. 20, Clauson Dep. at 176-77.

237. In addition to targeting media and political campaigning activities as a basis for indictment, the Arguments for Indicting the Corporation also posits other inappropriate reasons for seeking the company's indictment, including punishing REI for a 1977 grand jury investigation that did not result in indictment or prosecution, giving the government "greater flexibility and likelihood in pursuing civil remedies and penalties against REI," and "furnish[ing] the government a lever for plea negotiations." Ex. 36, SMFC3 09861-64, "Arguments for Indicting the Corporation" at SMFC3 09862-63. Former Chief Inspector Clauson testified that these would be an improper basis on which to seek someone's indictment. Ex. 20, Clausen Dep. at 180.

238. The Inspectors were not involved in any other case where they suggested that an indictment should be sought in order to give the government "greater flexibility and likelihood in pursuing civil remedies and penalties against" a party and/or "furnish the government a lever for plea negotiations." Ex. 41, Kormann Dep. at 741-43.

239. The Inspectors noted in the Arguments for Indicting the Corporation that they had no evidence that Moore or Reedy were individually aware of the Voss/Gnau payment scheme. Ex. 36, SMFC3 09861-64,

"Arguments for Indicting the Corporation" at SMFC3 09863.

240. During their investigation, the Inspectors focused on digging up "dirt" on REI's supporters on Capitol Hill. For example, when Chief Postal Inspector Charles Clauson was advised that "(Congressman) Zschau is running for Senate—so it looks like they are trying to throw a little dirt on him via REI," Clauson responded that "I hope we can get this data on all 'supporters' on the Hill both for the investigation and for Bob's [Zip + 4 Investigation] report." Ex. 101, SMFC4 07980-82, Edwards notes re: "digging up dirt" on REI supporters; Ex. 21, Edwards Dep. at 200-05; Ex. 20, Clauson Dep. at 149-50, Ex. 41, Kormann Dep. at 197; Ex. 22, McIntosh Dep. at 167-69.

241. As early as December 1985, the Inspectors had prepared an "Investigative Strategies" memo that labeled Moore and REI as "coconspirators in a scheme to defraud the U.S. Postal Service," even though there was no evidence that any such conspiracy existed at that time. Ex. 19, SMFC4 00202-239, Investigation Task Force's "Investigative Strategies" memo at SMFC4 00215-16; Ex. 21, Edwards Dep. at 423-26. Inspector Edwards acknowledged during his deposition that "I feel uncomfortable reading it today that it says coconspirators because there was no known conspiracy at that time." Ex. 21, Edwards Dep. at 457.

242. During their investigation, the Inspectors became aware that USPS management was frustrated over REI's congressional and media campaign concerning the MLOCR issue. Ex. 22, McIntosh Dep. at 239-40. According to Inspector McIntosh, USPS personnel "had the normal human reaction of being frustrated, especially since they didn't have any way to insulate

themselves from the continued receipt of criticism. They just had to basically sit there and take it." *Id.* at 240. See also Ex. 21, Edwards Dep. at 188 (REI's campaign to kill Zip+4 "ruffled some feathers" among USPS personnel).

243. As part of the investigative strategies that were developed by the Inspectors in December 1985, Inspector Hartman's notes reflect that the Inspectors were going to gather records relating to "REI contributions to candidates for public office." Ex. 19, SMFC4 00202-39, investigation Task Force's "Investigative Strategies" memo at SMFC4 00233, 235. Hartman also planned to gather all REI "internal and external memos and correspondence related to OCR issue to include but not be limited to incoming and outgoing messages and letters to . . . Elected/Appointed Public Officials (Congressmen, Senators)." *Id.* at SMFC4 00234.

244. The Inspectors were aware during their investigation that Moore had been lobbying Congress and media in a effort to obtain a postal service contract on behalf of REI. Ex. 41, Kormann Dep. at 174-75, 249-50, 383; Ex. 24, Hartman 05/07/98 Dep. at 318-19; Ex. 21, Edwards Dep. at 173-74, 178-179, 428; Ex. 22, McIntosh Dep. at 158, 442; Ex. 111, DOJ 0000032-372, 1/87 Zip + 4 Automation Investigation Report at 5; Ex. 65, Congressional letters; Ex. 186, 7/24/85 (SMFC3 08932) and 7/29/85 (SMFC3 08933) letters from Moore to Congress (transcribed by Inspectors); Ex. 19, SMFC4 00202-39, Investigation Task Force's "Investigative Strategies" memo at SMFC4 00239 ("Intense political lobbying is underway by REI's president, William Moore."). In fact, the Inspectors focused on Moore's and REI's PAC contributions and lobbying

efforts during their investigation. Ex. 153, SMFC3 09279-82, 7/24/86 Subpoena for REI PAC contributions and SMFC3 9157-59, 2/09/87 Subpoena re: REI's political activities; Ex. 36, SMFC3 09861-64, "Arguments for Indicting the Corporation" at SMFC3 09861; Ex. 187, POS-004-00598-609, Inspectors 8/05/86 draft outline of investigation ("Document REI's political action committee contributions to the above politicians who had taken a public stance on Zip+4"); Ex. 21, Edwards Dep. at 254-55, 405, 446-47; Ex. 41, Kormann Dep. at 176, 181, 183, 186; Ex. 24, Hartman 04/20/00 Dep. at 34-35; Ex. 19, SMFC4 00202-39 Investigation Task Force's "Investigative Stategies" memo at SMFC4 00216, 233-34); Ex. 133, SMFC3 02754-71, 3/03/87 Hartman's memo to file of "REI Interviews" at 3, 5-7, 12, 15. One subpoena requests, inter alia, (i) "articles placed with trade publications and reporters"; (ii) "records reflecting the arrangement of interviews with journalists and reporters"; and (iii) "records reflecting meetings with United States Congressmen." Ex. 153, SMFC3 9157-59, 2/09/87 Subpoena re: REI political activities.

245. During the investigation, Hartman reviewed Moore's diaries and prepared a summary that focused, among other things, on Moore's and REI's congressional communications. Ex. 188; SMB4 02742-806, Excerpts from Moore's diary (transcribed by Inspectors); Ex. 24, Hartman 04/20/00 Dep. at 252-53.

246. During the investigation, the Inspectors interviewed a staff member (Bonnie Catone) of Congressman Martin Frost and questioned her about Congressman Frost's assistance to REI. Ex. 59 USA-015-0258-62, Kormann notes of 2/09/87 Bonnie Catone Interview; Ex. 41, Kormann Dep. at 400, 404-05.

247. During the investigation, Hartman prepared a summary of the "more pertinent comments" from various interviews. Ex. 133, SMFC3 02754-71, 3/03/87 Hartman's memo to file of "REI Interviews". One of the excerpts that Hartman focused on was the fact that "Moore held fund raisers for Congressmen Brooks, Frost and Zschau at his private residence." *Id.* at 12. When questioned about this entry during his deposition, Hartman could not explain why this was one of the "more pertinent comments" from the interviews. Ex. 24, Hartman 04/20/00 Dep. at 282-83.

248. During the Investigation, Hartman and Kormann interviewed various members of the REI board of directors. As part of their standard questioning of the REI board members, Hartman and Kormann asked about REI's congressional lobbying campaign. Ex. 41, Kormann Dep. at 243-52; Ex. 189, 12/03/87 (SMFC3 02447-54) and 2/23/88 (SMFC3 0245562), Handwritten Interview Outline at SMFC3 02460 (Item J). They also inquired whether Moore had requested REI or any board members to make any political contributions. *Id.* at SMFC3 02462; Ex. 41, Kormann Dep. at 287-90.

249. During the investigation, Hartman and Kormann questioned Frank Bray about various congressional communications concerning the MLOCR issue. Ex. 41, Kormann Dep. at 676-77; Ex. 178, SMFC3 01754-83, Hartman notes of 06/09/87 Bray Interview at SMFC3 01774-75.

250. The Inspectors understood at the time of their investigation of Moore and REI that citizens and corporations have a constitutional right to make political contributions to candidates of their choice. Ex. 21, Edwards Dep. at 170; Ex. 41, Korrnarm Dep. at 177.

251. The Inspectors had never worked on any other investigation where someone's political contributions and correspondence with members of Congress were examined. Ex. 21, Edwards Dep. at 170, 405, 458.

252. During their investigation, the Inspectors focused on establishing when Congressional pressure came to bear on postal management during the procurement process. Ex. 86, Jellison Dep. at 74-76, 188-90; Ex. 190, DOJ23 001877-83, Inspectors' summary of 3/03/87 and 9/15/87 Neal Gregory interviews (focus on Moore's lobbying).

253. During their investigation, the Inspectors requested and received from ECA media data and resumes of various Congressmen who were supporting REI and Moore, including Representative John Kasik. Ex. 191, SM135 01020, 1/23/86 Memorandum from Ewald Lang, ECA to Hartman; Ex. 24, Hartman 7/07/00 Dep. at 10-12.

254. During the course of the investigation, Inspector Edwards felt that Hartman's and Kormann's questioning and treatment of various witnesses was too aggressive on occasion. In fact, Edwards recalled a "pretty heated" discussion with Hartman and Kormann where they got "pretty hot with each other" over this topic. Ex. 21, Edwards Dep. at 271-72, 365-68. While he could not recall the specifics, Edwards testified that "I just felt uncomfortable, and I pushed back pretty hard, and they pushed back—no physical—but, you know, some pretty hard words." *Id.* at 272.

255. On June 9, 1986, at 6:20 p.m., I spector McIntosh personally delivered to Paul Ca .'s residence various documents that had been gat. ed as part of the conspiracy investigation. Accord. to

McIntosh, these documents were delivered to Carlin because he requested them, and they were hand delivered because McIntosh believes that Carlin needed them as quickly as possible. Ex. 21, McIntosh Dep. at 95-105, 108-09; Ex. 102, DOJ23 00068788, McIntosh handwritten notes dated 6/09/86; Ex. 103, USA-015-0157, McIntosh note dated 6/09/86 re: "deliver to Carlin".

256. During the investigation of Moore and REI, the Inspection Service had an internal policy that prohibited the disclosure to third parties of information acquired during an investigation that was not a matter of public record. Ex. 22, McIntosh Dep. at 136. In this respect, it was a violation of Inspection Service Policy to disclose to a private citizen the results of information obtained during witness interviews that were conducted as part of an investigation. *Id.* at 137 .

257. On December 9, 1986, Inspector McIntosh Provided Carlin with sensitive and confidential interview summaries and FBI laboratory examination results related to Moore's criminal investigation. Ex. 22, McIntosh Dep. at 382-96; Ex. 103 SMFC4 01183, McIntosh's 12/09/86 handwritten notes of discussion with Carlin re: FBI lab results and interview. Specifically, McIntosh provided Carlin with the results of interviews with Albert V. Casey, John McKean (the chairman of the USPS Board of Governors), and Jackie Strange related to a BOG "freeze" order concerning the procurement of OCRs, as well as confidential FBI lab results relating to the freeze order. *Id.* While the average citizen or postal worker would not have been entitled to this sensitive information, the Inspectors justified their disclosure of this investigative material to Carlin on the grounds that he was the former post-

master general whom they felt had been "screwed" and improperly removed from office. Ex. 22, McIntosh Dep. at 391-93.

258. Inspector McIntosh was aware at the time he gave the results of the witness interviews and FBI lab results to Carlin on December 9, 1986 that Carlin was appealing the dismissal of a $15 million suit he had filed against the USPS Board of Governors as a result of his firing as Postmaster General. Ex. 22, McIntosh Dep. at 389-90; Ex. 103, SMFC4 01183, McIntosh's 12/09/86 handwritten notes of discussion with Carlin re: FBI lab results and interview; Ex. 110, SMB5 0138-39, 10/08/87 Letter from Carlin's attorney (Saltzstein) to. Clauson; Ex. 192, SMFC4 07998, Inspector's notes dated 7/25/86 ("use Carlin court brief").

259. Former Chief Postal Inspector Charles Clauson admitted that McIntosh's conduct in providing investigative information to Carlin after Carlin was fired as PMG was "'completely improper." Ex. 20 Clauson Dep. at 168.

260. Five days prior to McIntosh's disclosures to Carlin on December 9, 1986, BOG Chairman John McKean testified to the grand jury. As part of his grand jury testimony, McKean's statement—which was prepared by the Inspectors based on their prior interviews of McKean—was read and presented as an exhibit for the grand jury's consideration. Ex. 193, SMFC4 12785- 96, Grand Jury "Statement of John R. McKean" (hereafter "McKean Statement"). This summary statement included information concerning the March 5 BOG "freeze" order. *Id.* at 5.

261. On October 27, 1989, McIntosh submitted a statement to Judge Revercomb relating to

McIntosh's disclosures to Carlin on December 9, 1986. Ex. 194, WM 031662, 10/27/89 Mcintosh Statement to J. Revercomb. As part of his statement to the Court, McIntosh inaccurately represented that he had not been involved in interviewing any witnesses concerning the March 5 BOG "freeze" order, when in fact he had interviewed at least Albert Casey on this issue. Ex. 2, McIntosh Dep. at 393-96.

262. In September 1991, McIntosh was communicating with Carlin's counsel concerning the multi-million dollar lawsuit that Carlin had filed against Moore and others relating to Carlin's dismissal as PMG. As part of these communications, McIntosh received back from Carlin's counsel a copy of the "restricted" and confidential "Zip+4 Automation Report" that McIntosh and Edwards had prepared back in 1987. Ex. 22, McIntosh Dep. at 404-10; Ex. 195, 1-10-39, 5/01/91 Letter from Carlin's attomey (Saltzstein) to McIntosh (returning copy of Zip+4 investigation report).

263. On September 20, 1988, just sixteen days before the indictment against Moore and REI was handed down, Inspectors Hartman and Kormann met with Carlin to discuss the contents of the draft indictment. During this meeting, the Inspectors actually had a copy of the draft indictment with them. Ex. 41 Kormann Dep. at 723-25; Ex. 24, Hartman 5/08/98 Dep. at 450-52 and 04/20/00 Dep. at 10; Ex. 26, Trial Tr. at 2151-64; Ex. 196, Defendants' Concise Statement of Material Facts Not Genuinely in Dispute, ¶ 87.

264. The indictment that was actually returned against Moore, Reedy and REI contained language that had been suggested by Carlin during his meeting with Inspectors Hartman and Kormann on September 20, 1988. Ex. 26, Trial Tr. at 2151-64.

265. In May of 1989, Carlin brought a multi-million dollar lawsuit against Moore, Reedy and REI as a result of his dismissal as PMG. Ex. 26, Trial Tr. at 2162-2164; Ex. 197, Copy of Carlin's complaint.

266. In the course of their investigation, the Inspectors checked into the personal financial records of Moore and his wife going back at least 18 years, even though Moore did not join REI until 1982. Ex. 40, Moore Aff. ¶ 31; Ex. 24, Hartman 7/07/00 Dep. at 46-47.

267. In the course of their investigation, the Inspectors instituted a "mail cover" on Moore, whereby information that appeared on the external cover of first class mail addressed to Moore's residence was recorded by the USPS. Ex. 40, Moore Aff. ¶ 31; Ex. 198, Deposition Upon Written Questions of Henry J. Bauman, 3/25/92 at 19-21; Ex. 24, Hartman 5/07/98 Dep. at 324-25; Ex. 41, Kormann Dep. at 221-24.

268. Inspectors Hartman and Kormann actively advocated the indictment and prosecution of Moore. Ex. 41, Kormann Dep. at 153, 701-15; Ex. 24, Hartman 05/07/98 Dep. at 268-69, 294-299 and 04/20/00 Dep. at 62-63, 158-74. In this respect, unlike any other case they had ever worked on, the postal inspectors actively solicited the U.S. Attorney's Office in writing with letters from the Chief Postal Inspector to criminally prosecute Moore and REI. The Inspectors prepared two letters in May and July of 1988 and sent them under Clauson's signature to U.S. Attorney Jay Stephens. Ex. 20, Clauson Dep. at 185-194; Ex. 41, Kormann Dep. at 70102; Ex. 24, Hartman 05/07/98 Dep. at 294-99 and 04/20/00 Dep. at 157-58; Ex. 199, 05/13/88 (SMFC 4000556-57) and 07/27/88 (2-3-4) Letters.

269. Beginning in late 1987, Inspectors Hartman and Kormann met with Valder and other attorneys in the U.S. Attorney's Office on several occasions to review the merits of the case with the USAO review team and to advocate REI's and Moore's indictment. Ex. 200, SMFC4 00509-25, Inspectors' 6/11/86 notes re: DOJ briefings; Ex. 41, Kormann Dep. at. 690700. There is no evidence that, during these meetings, either Valder or the Inspectors ever disclosed to the review committee or to U.S. Attorney Jay Stephens, among other things: (1) the investigative teams' disclosure of grand jury materials to Spartin; (2) the misleading and incomplete nature of the grand jury witness statements that were scripted by the Inspectors; (3) the unfair manner in which key witnesses, such as Spartin and Bray, were coerced into giving misleading grand jury testimony; (3) the Inspectors' disclosure of confidential investigation materials to Carlin, including information that was presented to the grand jury regarding the BOG freeze order; (4) the results of Spartin's polygraph examination; or (5) Valders' and the Inspectors' failure to disclose exculpatory evidence to the grand jury as dictated by the U.S. Attorney's Manual.

270. On October 4, 1988, Valder appeared before the grand jury and asked that that an indictment be returned against Moore, Reedy and REI. As a part of his pitch to have the case indicted, Valder falsely represented to the grand jury that Marcus had provided Moore with an ECA brochure, and then he emphasized to the grand jury: "It's part of the theft circle, it's part of Voss doing the scheming for them. ***And it's right at a time when they're working on public opinion and Congress to bring pressure to bear on Carlin to not do the competitive procurements the he wanted to***

do and the Postal Service wanted to do. And three days after Moore gets that thing, he testifies before one of the committees on the Hill heaping criticism on the Postal Service for their handling of this." Ex. 201, DOJ1 000852-74, 10/04/88 Grand Jury Tr. at 000862 (Valder comments) (emphasis added).

271. The grand jury returned an indictment against Moore on October 6, 1988. Ex. 202, POS-004-0522-74, Copy of indictment.

272. Following his indictment on October 6, 1988, Moore lost his job at REI, and REI was debarred from postal procurement. Ex. 40, Moore Aff. ¶ 28; Ex. 203, POS 0130402-08, 10/05/88 USPS Procurement and Supply Memorandum re: REI debarment. In this regard, the Inspectors wanted to punish REI and Moore, and they developed a plan to "cleanse" the company of Moore even before Moore was tried for the charges alleged against him. Ex. 204, 004079-101, 11/25/88 Memorandum from Hartman to Clauson. As part of their justification for the "cleansing" plan, the Inspectors noted that "During November 1985 and through early 1986, Moore and REI publicly criticized Carlin's management of the MLOCR procurement." Ex. 204, 004079-101, 11/25/88 Memorandum from Hartman to Clauson at 004081.

273. On November 20, 1989, Moore was acquitted of all criminal charges against him. *Recognition Equip.*, 725 F. Supp. at 602.

Respectfully submitted,

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December 7, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case Number 92cv2288 (NHJ) (AK)
[consolidated with 93cv0324 (NHJ)(AK)]

WILLIAM G. MOORE, JR., PLAINTIFF

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

Case Number 93cv0324 (NHJ) (AK)
[consolidated]

WILLIAM G. MOORE, JR., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

VIDEOTAPED DEPOSITION OF
ROBERT J. EDWARDS

Washington, D.C.
Tuesday, Feb. 15, 2000

REPORTED BY:

FRANK A. SMONSKEY

* * * * *

[200]

* * * was upset with as much as he was the board. I certainly remember he was mad at the board.

MR. POHL: Okay. Rebundle that and put it aside here for a minute.

Let me ask that this document, the first page of which bears Bates number SMFC 407980, be marked as Edwards Deposition Exhibit 3 .

(Edwards Exhibit 3 identified.)

(Witness examined the document.)

BY MR. POHL:

Q. Do you have Exhibit 3 in front of you?

A. Yes.

Q. Do you recognize any of the handwriting on the front page of that document?

A. Yes, the chief and then the first part, this part here that I wrote (indicating).

Q. Okay. And attached to that copy of a routing slip are two newspaper articles?

A. Yes.

Q. The chief, would that be Chief Inspector Clauson?

A. That's correct.

[201]

Q. All right. Will you read the part that you wrote under the remarks section?

A. "Zschau is running for Senate—so it looks like they are trying to throw a little dirt on him via REI."

Q. Then there is a note underneath that says "Dave."

A. Right.

Q. And that's Clauson's handwriting?

A. I'm not very familiar with his, but, yes, I think this is his. Yes, it looks like that's his initial down at the bottom.

Q. Dave is Dave Smith?

A. That's correct.

Q. Okay. The name of the person is Zschau?

A. Zschau, yes.

Q. It's Z-s-c-h-a-u?

A. Yes, sir.

Q. All right. That refers to Congressman Ed Zschau, a Republican Congressman from Los Altos, which I think is California?

A. Yes.

[202]

Q. Where did you get these articles that you forwarded to the chief?

A. I don't have the slightest idea where I got them. In the Federal Times, I may have just gotten them here in D.C. But the San Diego Tribune. Once again, it may have been out of that Postal Service News Digest.

In fact, you might know if this next article says accident in it—no, that wouldn't make sense .

But that News Digest that I believe came out at this time that had every Postal Service-related article. People would fax in. See, that was their job, you know, public-relations people all over the nation. If the local newspaper had "Dog Bites Mailman," you know, they'd send in the article then somebody here to compile and send back out.

Q. These are two. One is July 31, '86. The other is August 11, '86. Right?

A. Uh-huh.

Q. And that is after the Voss plea?

A. Yes, that's correct.

[203]

Q. It's during the time when there was at least one grand jury subpoena out on REI, the one you had?

A. Yes, the one that I had.

Q. You and Harrington delivered it in April of '86?

A. Right.

Q. Okay. Your notes says: "Zschau is running for Senate. So it looks like they are trying to to throw a little dirt on him via REI," right?

A. Yes.

Q. Way did you think the chief inspector would be interested in that?

A. He just always liked to know what was going on with the case. I mean, this article in the Federal Times is a pretty good seized article for the Federal Times. He just wanted to know. I mean, if there was anything to do with the whole procurement, he would want to know about it.

Q. Who's the "they" you refer to or trying to throw dirt on a congressman?

A. I don't know. So it looks like, "They are [204] trying to throw a little dirt on him via the REI." I just don't know.

Q. Now, the response note, do you believe that was written by Clauson?

A. Yes, I believe it was.

Q. Dave Smith?

A. Yeah, I believe it was because of the initials.

Q. Did you ever see that before?

A. Well, I'll answer it two ways. I don't remember any of this until you showed me. I know obviously this is my note and I did this. I certainly don't remember seeing this note to Dave. I don't have any recollection of this note.

Q. Clauson's note says, if I'm reading it right: "Dave, I hope we can get this data on all 'supporters' on the Hill both for the investigation and for Bob's report."

Do you see that? Did I read that right?

A. Yes.

Q. Do you know what Clauson meant in the parlance that you would use in the inspection service [205] with regard to supporters on the Hill?

A. I hope we can get this data on all 'supporters' on the Hill.

I guess what he meant was people who had—just reading into this—that this data on all supporters of the buy REI, if you will, buy REI effort. That's what I'm guessing that means.

Q. All right. In context that's what it seems to me.

A. That's what it would seem to me, yes.

Q. And Bob's report, that's this big report that you were working on?

A. I guess so. But it seems like I wasn't working on it that early, because, like I said, I came back from New York in February of '87 to put that report together. It seems like that's early.

Maybe he had asked me to do it, but I sure didn't around to doing it for quite a long time afterwards. This isn't dated here.

I assume this is contemporary to these two articles. But I don't recall that we were working on it at that time.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 92-2288 NHJ

WILLIAM G. MOORE, JR., ET AL., PLAINTIFFS

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

No. 93-0324 NHJ

WILLIAM G. MOORE, JR., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

The deposition of MICHAEL HARTMAN was taken on Thursday, May 7, 1998, commencing at 9:00 a.m., at the offices of Jones Day Reavis & Pogue, 1450 G Street, N.W., Washington, D.C., before Robert F. Sager, Notary Public.

* * * * *

[246]

A. The truth.

Q. Are you saying that—you certainly believe it would be improper, don't you, in drafting a witness statement, to leave out portions of what the witness has told you which is exculpatory and which if the

Grand Jury knew about it might well cause them not to indict someone?

A. I don't know if that is the case or not. The presentation of exculpatory evidence, Brady material, again is the interpretation of the United States Attorney; what to present to the Grand Jury is a decision of the United States Attorney, to my understanding.

Q. In this particular case, you worked with other agents to prepare summaries of witness testimony, right?

A. Yes.

Q. And you understood that the witnesses were going to go into the Grand Jury room and just read those summaries, right, and adopt that as their own testimony?

A. They were going to, to my understanding, [247] read those summaries and swear that they were truthful. Whatever else they did in the Grand jury was beyond my control.

Q. You recall being cross-examined by Mr. Bennett at the trial in this action?

A. Yes.

Q. I think you indicated to him that in the witness summaries for Voss, Gnau, Spartin and Marcus, which you either drafted or participated in preparing, none of those witness summaries said directly that the witness had told you and the other inspectors that none of them told Bill Moore

directly of the kickback scheme; do I recall the testimony correctly?

MR. MONTAGUE: Object to form.

THE WITNESS: I don't know if you recall the testimony correctly or not.

BY MR. POHL:

Q. Did any of the summaries say specifically that the witness whose summary it was never told Bill Moore about the conspiracy?

A. I don't know if they said that they never [248] told Bill Moore about the conspiracy. To my recollection they did not. But you are making a general statement about "told Bill Moore about the conspiracy." Bill Moore participated in the conspiracy, they didn't have to tell him about the conspiracy.

Q. Well, none of the statements indicate from those four witnesses that the witnesses never told Bill Moore of the kickback scheme? The statements don't say that, do they?

A. I have not seen the statements since 1989. They speak for themselves. They are part of the Grand Jury transcript.

Q. I am talking about what—Well, I know they are part of the Grand Jury transcript, but this was discussed in your cross-examination at trial, wasn't it? That you read yesterday?

A. To my recollection there was some discussion of this area, but I can't recall a specific question.

Q. Well, don't you remember telling Mr. Bennett at trial, and I can appreciate why you might not [249] want to admit this, that none of the statements contained the specific statements that those witnesses had told you that they never told Bill Moore about the kickback scheme?

A. Now you are asking a different question. Now you are asking if they told him about a kickback scheme. Before you asked if they told him about a conspiracy.

Q. Let's take it one at a time. The kickback scheme. You asked the witnesses when you interviewed them, and you asked them on more than one occasion, as to each witness, if they ever told Bill More about the kickback scheme. That is true, isn't it?

A. In substance that is true, that they did not tell—they said that they did not tell him that they were paying Peter Voss.

Q. And you left those out of every single witness summary you drafted, didn't you?

A. It isn't a matter of leaving something out.

Q. Well, it wasn't in the statements, was it?

A. If it is not in the statements, it is not in [250] the statements .

Q. And you believe as you sit here today it was not in the statements, isn't that right?

A. I suspect that there is something in the statements about Bill Moore's participation in this conspiracy.

Q. I am asking you about the kickbacks right now. You are trying to change the question on me and you made Mr. Bennett work a long time. I don't know why you don't want to answer the question. But I will take the time to fish it out of you.

A. You are asking me—

MR. MONTAGUE: Hang on, Mike, that is not a question, it is a speech.

BY MR. POHL:

Q. Isn't it a fact you never put in the witness summaries that the witnesses never told Bill Moore about the kickback scheme? Isn't that a fact, sir?

A. That the witnesses never told. To my knowledge it is not—in that manner it is not in those statements. But it is not a matter of leaving something out.

* * * * *

[253]

* * * front of the Grand Jury, Mr. Bennett read from the transcript it appears.

He said: "And do you remember being asked this question by Mr. Valder:

"QUESTION: To help focus the Grand Jury's thinking and knowledge of the facts, can you maybe take five minutes or two, I don't care how long you take, but sort of summarize for them the real important pieces of evidence in light of this large scenario that we have. Just summarize the very most important pieces of evidence which indicate reason to think that perhaps one or more of the REI officers knew of and participated in this payoff scheme. Do you remember that, sir?

"ANSWER: Yes, sir."

Was that your testimony at that time:?

MR. MONTAGUE: Why don't you let him read it?

(Document handed to witness by Counsel Pohl).

THE WITNESS: As far as I know, yes, this is my testimony at that time. It is the transcript.

[254]

BY MR. POHL:

Q. Was that testimony true when you gave it under oath?

A. Yes.

Q. Jump ahead to page 3804 of that transcript.

"When Mr. Valder started asking you to focus in on the knowledge of Reedy and Moore, he

said he wanted you to summarize the important pieces of evidence, is that right?"

Your answer is, "That is what he said, yes."

Was that your testimony on that day?

A. If you are reading from the transcript, yes, it is.

Q. You may look at that. It starts at the top there and it is the first answer.

A. Yes.

Q. And let me see that back again.

The next question on page 3805 is:

All right, you did not tell the Grand Jury, did you, that Gnau said that he didn't tell the defendants about the payments to Voss. You didn't tell the Grand Jury that, did you.

[255]

"ANSWER: That is correct."

That is your answer. Was that your testimony at that time?

A. As far as I know, yes.

Q. And was that testimony accurate when you gave it?

A. Yes.

Q. So now Mr. Valder asked you to summarize the, quote, "real important pieces of evidence in light of this large scenario that we have. Just summarize the very most important pieces of evidence which indicate reason to think that perhaps one or more of the REI officers knew of and participated in this payoff scheme." And in answering Mr. Valder's question you never told the Grand Jury that Gnau had specifically told you that he didn't tell Moore and Reedy about the payments to Voss. You never told them that, did you?

A. To the best of my recollection, and according to that transcript, no, I did not tell them that.

Q. And the reason you didn't tell them is [256] because at that point you had made up your own mind that you wanted to get an indictment of Moore and Reedy, isn't that true?

A. No.

Q. Explain to me why you didn't tell them?

A. John Gnau had told us what Robert Reedy asked him, What is your arrangement with Peter Voss. And he told Robert Reedy, It is better you not know what our arrangement with Peter Voss is.

John Gnau considered that in essence to be telling REI that he had a financial relationship with Peter Voss. And I probably testified to that in the Grand Jury.

Q. The Grand Jury transcript would be the real source of what you testified to, right?

A. Yes.

Q. And when Mr. Valder had asked you to give the Grand Jury the important pieces of evidence with respect to what Reedy and Moore knew, you never specifically told the Grand Jury, did you, that Marcus, Spartin, Gnau and Voss had all told you and your investigative team more than once that [257] they had not told Moore specifically about the kickback scheme?

MR. MONTAGUE: Object to form.

THE WITNESS: Again, it is difficult to follow that long question as to what I told the Grand Jury.

I don't have the Grand Jury transcript in front of me to refresh my recollection as to what I said to the Grand Jury.

BY MR. POHL:

Q. Mr. Hartman, you know that you went out of your way not to tell the Grand Jury that specific fact that all of those four conspirators had said repeatedly and plainly that they had never told Moore about the kickback scheme. Didn't you specifically plan not to let the Grand Jury know that?

MR. MONTAGUE: Object to form.

THE WITNESS: It is a very long question. It is very easy to—listen to me a second. It is very easy for me to understand the end of your question and, No, I did not plan, I never [258] intentionally

withheld any fact from the Grand Jury or anyone else.

I advised the United States Attorney's Office and all Assistant United States Attorneys involved in this matter that the co-conspirators told us that they did not directly tell Bill Moore and others that there was a, quotes, kickback arrangement, but that the evidence indicates that Moore, Reedy, and REI knew that there was an illegal relationship between Peter Voss and these co-conspirators.

Q. You did tell the Grand Jury, if I understand what you are telling me, that you thought the evidence, the circumstantial evidence was such that Moore would have known or must have known; is that what you told them in substance?

A. I don't recall telling the Grand jury what I thought or what I believed. I only gave them, to my knowledge, the fact situations.

Q. And in giving them, as you said, the fact situations, you left out, didn't you, the fact that each of the conspirators had said specifically and [259] directly to you that they didn't tell Moore about the kickback scheme? You left that part out, didn't you?

A. Again, you know, there is a difference in what the co-conspirators believed Moore knew, or Reedy knew and REI knew and it is difficult for me—

Q. You are not answering my question. I move to strike as not responsive. If you want it read back

you can answer. Or if you agree to review the Grand Jury transcript and show me where you told them directly what those four conspirators had told you—

A. Sir, I believe I was responsive, because John Gnau did—

Mr. MONTAGUE: Okay.

MR. POHL: Would you read the last question

(The record was read as requested.)

THE WITNESS: I didn't intentionally leave anything out, is my answer to that question

BY MR. POHL:

* * * * *

[272]

Q. We talked briefly about the incident with Mr. Bray's lawyer, with Judge Huvelle. That was the night before Mr. Bray testified to the Grand Jury, right?

A. Yes.

Q. And let me back up a second.

Why weren't witnesses allowed to just go in and be asked questions and answer them however they should be answered under oath?

Why were these summaries that others other than the witnesses drafted used?

A. Well, you said why weren't they allowed. As far as I know, they were allowed to go in and testify without the summaries.

Q. Did you ever tell people that you wanted them to testify from the summaries? Or did Mr. Valder or anyone in your presence say that to the witnesses?

A. I didn't tell them that I wanted them to, and I don't recall anyone telling them that we wanted them to do it in this manner.

Q. Prior to this case had you ever used this [273] practice of having key witnesses testify from summaries, rather than what I will call spontaneously?

A. Not to my recollection.

Q. Why was it used in this case?

A. Decision of the United States Attorney.

Q. Did he suggest it?

A. Yes.

Q. That was Joseph Valder?

A. Yes.

Q. What was your understanding of why it had to be done that way?

A. Primarily Mr. Valder believed that that was a more efficient way to present the evidence to the Grand Jury .

Q. More efficient in terms of controlling the content that the Grand Jury would get?

A. No.

Q. Well, that was one of the consequences of doing it that way, wasn't it?

A. That is what has been alleged, that that was a consequence.

[274]

Q. Well, that was in fact what happened, wasn't it?

A. That we controlled—

Q. The content.

A. Again, I didn't control what happened in the Grand Jury. I was not present in the Grand Jury. I don't now if one or all of these people had an opportunity to make additional statements in front of the Grand Jury.

And the Grand Jury had the opportunity, I would imagine, to ask any question they wished of this witness in the Grand Jury.

So I did not participate in any attempt to control what evidence was presented to the Grand Jury.

Q. You did to the extent that you drafted the summaries, right?

A. Again, I did not participate in any action to control what was presented to the Grand Jury.

Q. Let's focus now on your meeting with Mr. Bray and his counsel the night before he testified. Who drafted the witness summary for [275] Mr. Bray?

A. Me.

Q. And what time did the meeting with now Judge Huvelle and Mr. Bray begin; do you remember?

A. No.

Q. It went until about one in the morning, though, didn't it?

A. I believe it went after midnight.

Q. Mr. Valder left at some point, didn't he?

A. Yes.

Q. And at that point he left the negotiations with respect to what was going to be in Mr. Bray's statement up to you and Mr. Bray's counsel, didn't he?

A. I don't know if negotiations is a proper word. But he left it to us to finalize Mr. Bray's statement.

Q. Is negotiations an improper word for what went on that night?

A. I don't know if I would call it negotiation, but each side expressed their reason for the statement,

and the sentences within the statement [276] and the words within the statement and each side had an idea of what should be in the statement and there was give and take.

Q. When you came to that session, Mr. Bray's counsel reviewed the statement that you had prepared, right?

A. The original—the initial part of the visit, or the meeting, or the planned meeting was they reviewed the statement outside our presence, if I recall correctly.

Q. And then didn't Mr. Bray's counsel tell you in substance they thought the statement was slanted, misleading and not fairly complete?

A. I don't recall those words. I know that there was some testimony to that effect by Mr. Bray, but also that the statement was truthful.

Q. Wasn't there testimony to that effect by Mr. Bray's counsel?

A. She was not a sworn witness in that case.

Q. You were present that night with Mr. Bray and his counsel when they commented on your draft statement, right?

[277]

A. I was present, yes.

Q. And were you present in the courtroom when Mr. Bray testified at the trial?

A. Yes.

Q. And he indicated, I think, that the statement was misleading and one-sided; is that your recollection of the testimony?

A. I don't recall him saying it was misleading. I do recall maybe on cross-examination he agreed that it may have been slanted.

Q. Did they express that to you the night of the meeting before he testified to the Grand Jury?

A. There was debate on word structure, sentence structure. I do not recall them ever saying that it is misleading and slanted.

Q. You don't recall them ever telling you anything to that effect?

A. I don't have any recollection of them using those words. I knew that everything that was contained in that statement were words that came out of Frank Bray's mouth.

Q. Based on your recollection and notes of the [278] prior interviews you had with Mr. Bray?

A. Yes.

Q. The fact is that evening Mr. Bray would not sign that as his statement at first, isn't that right?

A. I don't recall us asking him to sign it that evening.

Q. Well, didn't they tell you, whether or not he signed it, he wouldn't adopt that as his statement as you first presented it to him?

A. They wanted changes made to the statement, and they wanted to make additions to the statement, and to the best of my recollection that decision was to be made the next day.

Q. You resisted having him change his statement from time to time that evening, didn't you?

A. Yes. There were certain statements that I knew he made, I knew they were true, and he wanted them removed because his attorney did not feel they sounded right.

Q. Once again, this was the witness' statement, right? It was going to be the witness' testimony [279] to the Grand Jury?

A. This was a summary of statements he made to postal inspectors and was going to be presented along with his testimony.

Q. Well, except for whatever questions or answers might be added at the end, if any, this was going to be his Grand Jury testimony? You understood that, didn't you?

A. If he believed that it was accurate and truthful, then he was going do adopt it in front of the Grand Jury and testify that it was accurate and truthful, yes.

Q. This was going to be his testimony about the underlying events, this wasn't going to be, "By the way, this is what I told the agents in prior interviews," right?

A. Probably a combination of the two. I don't recall how the first paragraph to the statement read, if it said this is a summary of statements made to postal inspectors. I am not sure.

Q. Did you have that kind of paragraph at the beginning of any of the witness' summaries?

[280]

A. I don't recall.

Q. You don't recall a single instance when you did, right?

A. I don't recall. I know from reading my transcript yesterday that I testified that these statements were summaries of interviews on given dates. I don't recall how the first paragraphs read. I haven't seen it since 1989.

Q. These were designed to be the witness' testimony to the Grand Jury about the underlying events, right?

A. It was to be the witness' testimony, yes.

Q. And was it or was it not your view that, because it was the witness' testimony, the witness had an absolute right to say it however he or she wanted?

A. I don't recall having a view. The prior statements were agreed to as being accurate and truthful and were adopted and presented. With Frank Bray there was a lot of discussion concerning his statement, and most of that came from his attorney, not from him.

[281]

Q. You understand that in our legal system people get to speak through their attorneys from time to time; don't you understand that?

A. But we were not in a courtroom that evening. His attorneys were speaking.

Q. Are you saying only in court is someone allowed to speak through an attorney?

A. No, I don't know if he has—what his legal interpretation is or what those attorneys were doing that night. But those attorneys were the ones that wanted to take out of his statement things that were truthful according to him, and things that he said and they had a desire, for whatever reason, to remove them from his statement.

Q. You said earlier, and I think you alluded to it just in that answer, that you objected to the statement being changed because they wanted to take out things that were true.

What is it that you have that allows you to decide what is truth and what is not truth?

A. It wasn't a matter of me to decide what is the truth. Frank Bray was sitting in that room [282] saying, Yes, I said that and, Yes, it is true, but his attorneys wanted to take it out.

Q. Are you saying that at that time, and of course Mr. Bray will tell us what he said, but I want your recollection of it, that he was saying that what they wanted changed in the statement was true; that at that time he was saying, when Ms. Huvelle said I want that out, that he was saying, "But it is true"?

A. It is my recollection that—

Q. Or are you saying—

A. —he acknowledged during the course of that discussion of taking it out that it was a true statement, and to the best of my recollection Ellen Huvelle agreed it was a true statement but she did not like it in the statement.

And if I objected, I may have objected during the course of that meeting, but the bottom line was that those things that they wanted changed were changed .

Q. Well, the fact is there was a paragraph that they wanted in that you wouldn't put in, right?

[283]

A. It wasn't my decision to put it in. It was decided the next day.

Q. That night you didn't agree to put it in, did you?

A. It was written on the statement to my recollection that night. I was not sitting there retyping the statement. To my recollection they wrote down what they wanted to add and we decided that decision would be made the next day.

Q. Who made it?

A. The decision was made among Joe Valder and Ellen Huvelle and I think his name was Chris Kearney.

Q. Did you participate in that discussion?

A. Possibly part of that discussion.

Q. Not possibly; you know you did, don't you?

A. With all those people present? I am not sure.

Q. Some combination of them?

A. I am sure I discussed it with Joe Valder. I don't know if I discussed it with Ellen Huvelle the next day.

[284]

Q. What was in the written-in paragraph that they wanted to add?

A. To the best of my recollection, and reading this transcript, it was language concerning what Bray believed Bill Moore and Robert Reedy believed.

Q. It was language that specifically said, "I don't think Bill Moore knew about the kickback scheme," right?

A. It was somehow related to that.

Q. And that didn't get put in the final summary that Mr. Bray read to the Grand Jury, did it?

A. To the best of my knowledge, it did not.

Q. If the witness acting with and through an attorney wanted something put in the witness' statement, why would you resist putting it in, unless you were trying to control the flow of what you thought the Grand Jury should see?

A. Again, the final decision was not mine as to what was included in Frank Bray's statements.

Q. I didn't ask you whose decision the final decision was.

You can have the question read back, if you

* * *

* * * * *

[310] would be more than 20 hours of interviews for Spartin?

A. It could be, yes.

Q. Of all these people, who did you spend the most time interviewing?

A. I couldn't say. I spent almost an equal time with these witnesses.

Q. And is it fair to say that you were using different what I will call investigative techniques to try to get Mr. Spartin to say that Bill Moore knew of the kickback scheme, or must have known?

A. We never tried to get Bill Spartin to say anything.

Q. Did you use other people's testimony to try to persuade him that he should say something?

A. I did not.

Q. Who did?

A. Around—late 1986 early 1987—I shouldn't even start with the date, I am not sure when. He to my recollection was given an opportunity to read statements of others.

Q. Whose statements?

[311]

A. To the best of my knowledge, he would have reviewed Gnau and Marcus. I am not certain if he read Voss's or Peterson's. I doubt if he read Bray's.

Q. When you say statements, were these statements that were taken as part of the ongoing Grand Jury investigation?

A. These were the statements that we have been discussing.

Q. The witness summaries that they read to the Grand Jury?

A. They were read to the Grand Jury, yes.

Q. If Mr. Moore or his counsel had called you and said can I see those statements, would you have let them see those statements back in 1986 or 1987?

A. I don't know. They didn't call and ask.

Q. Those were Rule 6(e) materials, weren't they?

A. A judge would have to decide whether or not those statements were Rule 6 (e) .

Q. In your own mind, they were, weren't they?

A. I don't recall if I thought about it at that

* * *

Supreme Court, U.S.
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No. 04-1495

In the Supreme Court of the United States

MICHAEL HARTMAN, ET AL., PETITIONERS

v.

WILLIAM G. MOORE, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

(VOLUME 2)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92CV2288

WILLIAM G. MOORE, JR., PLAINTIFF

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

Civil Action No. 93CV0324

WILLIAM G. MOORE, JR., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DEPOSITION OF MICHAEL HARTMAN
(Volume II)

Washington, D.C.
Thursday, Apr. 20, 2000

Reported by: Roxanne Easterwood, Court Reporter

* * * * *

[70]

* * * responsible for Reedy's knowledge and Bray's and a combination of the officers. So the culpability of the corporation could be argued could be higher than the individual's culpability. There was no question about elements of the offense.

Q. Well, look at your handwritten note again. Doesn't it say, "Even where no single employee had knowledge that all elements necessary to complete the offense had occurred?" That's what it says, right?

A. That's what it says, yes.

Q. If you look at page one of exhibit 11, your first basis there, number one, will you read that?

A. "Independent of Voss/ GAI corporation and it's PAC funded a media and political campaign to discredit USPS management and cause financial harm to USPS. For example, staged questions and testimony before congress. Frost amendment to freeze USPS appropriations bill."

Q. You drafted that language there, didn't [71] you?

A. I believe so, yes.

Q. What was the media and political campaign to discredit USPS management and cause financial harm that you were referring to there?

A. A and B. I was referring to staged questions and testimony before congress and the Frost amendment to freeze USPS appropriations bill.

Q. You used the words, "for example," there, right?

A. Yes

Q. Those are two examples you give?

A. Yes.

Q. That was not meant to be the exhaustive list of what you were referring to, was it?

A. I don't know of any other examples as I sit here now, but there may have been other examples.

Q. What was the media aspect you were referring to in line two of paragraph one?

A. I can only say that the media supported [72] the political portion which supported what was going on with Peter Voss on the inside.

Q. Were you referring to Mr. Chapp's comment that we reviewed earlier where he had told Mr. Moore to, "get the media off our back?"

A. No.

Q. Did you discuss with Mr. Chapp that Mr. Moore was involved in taking REI's case to the media?

A. Did I discuss that with Mr. Chapp?

Q. Yes.

A. The only recollection I would have would be that comment that he made during the interview that I wrote the note.

Q. Did you discuss with anybody during your investigation what activities Mr. Moore and REI were involved in with the media?

A. Yes.

Q. You discussed it with a number of people, didn't you?

A. Well, we gathered—if you review the file, you see that we gathered some newspaper [73] articles. So, yeah, we discussed what was going on in the media.

Q. You subpoenaed Hill and Knowlton too, didn't you?

MR. MONTAGUE: I'm going to object. I'm going to object that, again, you're getting into 6e areas.

MR. POLTZ: It's public. It came out at the trial. That's not protected.

MR. MONTAGUE: Failure to subpoena to Hill and Knowlton?

MR. POLTZ: That's my understanding.

MR. MONTAGUE: It's not mine. That's the only problem I've got.

BY MR. POLTZ:

Q. You interviewed Neal Gregory, didn't you?

A. Yes.

Q. Who was he employed by?

A. Hill and Knowlton.

Q. You discussed with Neal Gregory his activities on behalf of REI with respect to the media and congress, didn't you.

A. That may be among the things we discussed with him, yes.

Q. You gathered extensive newspaper clippings about the various aspects of REI's involvement in trying to sell multi-line OCR machines to the USPS, didn't you?

A. The news clippings that I recall are clippings concerning the Casey appointment, what came after the Casey amendment appointment. There may have been some conversation on automation.

Q. Well, what was it that you were referring to when you said a media and political campaign? Describe to me the media aspects of that you're referring to.

A. I don't recall specifically what particular media articles I was speaking of or had in mind at the time. As I said, there was some media.

Q. What was the political campaign that you were referring to that was the basis for an indictment?

[75]

A. I didn't say it was a basis for an indictment.

Q. Well, the top of the page says, "arguments for indicting the corporation," doesn't it?

A. That's what it says, yes.

Q. The word "basis" is just to the left of that paragraph one, isn't it?

A. Yes.

Q. What was the political campaign you were referring to in paragraph one there?

A. Again, the basis does not mean that each individual item or collectively in themselves are the basis for an indictment. They're a basis for the conclusion above that this is not just the actions of one persons or two persons. These were corporate funded actions that involved individuals other than Moore and Reedy so that it was a corporate strategy. So the basis—and these numbered paragraphs relate to proof or evidence that this is a corporate strategy as opposed to simply the actions of one person or two people.

[76]

Q. What was the political campaign you're referring to there?

A. I gave you the examples. There were certain actions in congress that assisted the goal of the conspiracy, being the award of a contract to REI, and they took certain actions that assisted the conspirators in arriving at that goal.

Q. You would agree that Mr. Moore had an absolute right to tell members of congress that he believed his company's machine was better than anybody else's, don't you?

A. I don't know if it's an absolute right. He has a right to do that.

Q. You know that is a First Amendment right?

A. I'm not saying that it is or is not a First Amendment right. I'm not an expert on the First Amendment, but he certainly, I agree, has a right to above board present his story or his wishes to the—to his congressman.

Q. When you say above board, are you saying [77] that in your eyes as a postal inspector when he is engaged in a postal procurement he cannot meet privately with congressmen?

A. No, I'm not saying that.

Q. What did you mean when you said above board?

A. That it is done honestly and with the disclosure that is required for campaign contributions, et cetera.

Q. You never found any evidence that any federal election laws were violated, did you?

A. I didn't look for evidence of federal. I don't know the federal election laws.

Q. You agree that any citizen can express his opinion to his congressmen even if the Postal Service doesn't agree with the opinion?

A. Yes, they can express their opinion.

Q. And that opinion would include that my product is better than somebody else's that the Postal Service is buying?

A. Yes.

Q. And you would agree that a citizen has [78] an absolute First Amendment right to go to the media or to congress and say Postal Service management is stupidly wasting money?

A. Again, I don't know what you mean by absolute. As long as it's done honestly and without corruption, yes, they have that right.

Q. You said as long as it's done honestly. Does that mean if you determine that somebody says something in the media that's false that the Postal Service can have them indicted?

A. The Postal Service doesn't indict anybody, but—you would have to give me an example of what you mean by they're saying something that's false.

Q. Let's say if Mr. Moore had gone to the media and said, "we have a better machine and we can deliver it and the Postal Service is wasting our money by going—pursuing this Zip+4 strategy," would you, based on what you knew at the time, say that those were false statements?

MR. MONTAGUE: Object to form.

THE WITNESS: No, I would not consider [79] that a false statement.

By MR. POLTZ

Q Would you agree that that was a perfectly protected First Amendment communication?

A. He had the right to do that, yes.

Q. Did Mr. Chapp, when he was talking to you about telling Mr. Moore to get the media off our back, did he ever tell you that Moore had ever said anything in the media or REI had ever said anything in the media that was false or illegal?

A. No, I don't recall him saying that.

Q. You're not aware of anything that REI or Mr. Moore ever did with regard to a media strategy that was false or illegal, are you?

A. I don't know if it was false or illegal. He concealed things when he did media interviews con-

cerning the Casey appointment. He concealed it from the media.

Q. It's not a postal inspector's job to seek indictments of somebody in circumstances where the inspector thinks that somebody didn't make a compete statement to the media. Would you * * *

[130]

Q. Looing at background and conspiracy. Does that look to you like—

A. Oh, background. You're in background?

Q. Yes.

A. Yeah, that looks different.

Q. That looks like a dot matrix printer, doesn't it?

A. Again, I'm not familiar with dot matrix versus laser versus whatever they have right now, ink jet.

Q. Let's focus on the Bates stamp numbers that go from 06 to 019. You believe you prepared that or had substantial input into preparing it?

A. Yes.

Q. On page 11, which is Bates number 19, there is that section: Moore, Reedy's and REI's intent to defraud. Do you see that?

A. Yes.

Q. Do you believe you prepared that?

A. Yes.

Q. The last item on that page says, "During the period August '85 to April '86 REI continued [131] to undermine the competitive testing program via the media and congress." Do you see that?

A. Yes.

Q. You have that in a section that indicates that you believe that's evidence of an intent to defraud the Postal Service?

A. Yes.

Q What did you mean when you said, "continue to undermine the competitive testing program via the media?" Let's take the media first.

A. I don't recall what newspaper articles or—I don't recall, you know, TV or radio. I don't recall what specific TV or articles underlined this statement. Just that they had signed an agreement to compete, and it was the goal of the conspiracy to undermine the competitive program, to cancel the competitive program and to cause a sole source award. So any actions to undermine the competitive testing program supported the conspiracy and the object of the conspiracy.

[132]

Q. You're saying by going to the media that was improperly in some fashion undermining the competitive test program?

A. It could, yes.

Q. Postal Service ever tell people that once you attempt to get a contract from us, competitive or otherwise, you lose your right to tell the media anything?

A. No.

Q. Wouldn't you think—

A. Although, I'm sure there's some agreements that are confidential that you can't disclose.

Q. That' s not applicable here?

A. I'm not saying that that's applicable here.

Q. What specifically were you talking about in terms of REI's undermining the competitive testing program via congress?

A. I referred to before the Glen English hearing was—the competitive program was in place. REI agreed to compete, and they were [133] seeking to influence Paul Carlin to award sole source contracts or if he didn't to remove Paul Carlin or Jim Jellison or whoever else was standing in their way, and one of the tools to do that is congress .

Q. And you have that on a page that says that's evidence of intent to defraud?

A. That's on the same page, yes.

Q. Did anybody ever tell you at any time—I'll withdraw that. Let's look now at the rest of details of offense, starting with the table of contents where

it says on page—the page right after the table of contents, "key players." See that?

A. Uh-huh .

Q. Who made the list of key players?

A. Frank and me, I guess.

Q. Let' s go down to the third one, Jack Brooks. He's was a congressman from Texas at the time, right?

A. Yes.

Q. What is it in the investigation that in * * *

TRANSCRIPT OF PROCEEDINGS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Action Number
CR 88-0385

UNITED STATES OF AMERICA, PLAINTIFF

v.

RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR, ROBERT W. REEDY, DEFENDANTS

AFTERNOON SESSION

Washington, D. C.

Wednesday, Oct. 18, 1989

* * * * *

[1808]

Q. Now, I would like to turn to go ahead, turn now to June 9, 1987, July of 1987, the time when you sat down with Mr. Valder and Mr. Hartman and Mr. Kormann with your lawyer to begin discussions and interviews with them; all right?

A. Yes, sir.

Q. If you could turn now to Exhibit Number 88. That's the third from the end of the book.

A. Yes, sir.

Q. And that's a letter, isn't it, to your lawyer, as you have identified previously, from Mr. Valder that assures you that you will not be prosecuted in this case?

A. That's the way I understand it, yes, sir.

Q. And that is also the letter that says in it, "There is no evidence to suggest his knowing"—your knowing—"participation in the illegal payments by Gnau to Voss"; is that correct?

A. Yes, sir.

Q. Now, the fact is, isn't it, that in your various meetings with Mr. Valder and with Mr. Kormann and with Mr. Hartman, in June and July of 1987, that you told them a number of times that you didn't know that Mr. Gnau was making illegal payments to Mr. Voss; is that correct?

A. Yes, sir.

Q. And you also told them, didn't you, that as far [1809] as you knew from your knowledge, neither Mr. Moore nor Mr. Reedy knew that either; is that correct?

A. Yes, sir.

Q. Now, you then after this letter was given to you, you then proceeded to be interviewed on a number of different days—

A. Yes, sir.

Q. —by the Postal inspectors and Mr. Valder; is that correct?

A. Yes, sir.

Q. June 9, June 10, July 14, July 15 and ultimately testifying in the Grand Jury on July 16 of 1987; is that correct?

A. I believe that's correct, yes, sir.

Q. In each of these sessions, you were a good part of each of those days; is that correct?

A. Yes, sir.

Q. And having met with the inspectors on June 9, June 10 and July 14, on July 15, when you went in to be interviewed again, the inspectors gave you a summary statement that they had prepared of what you had told them that they wanted you to be your testimony in the Grand Jury; is that correct?

A. Yes, sir.

Q. And they gave it to you for you and your lawyer [1810] to review; is that correct?

A. Yes, sir.

Q. And you did review it. It was quite lengthy, wasn't it?

A. Yes, sir.

Q. In fact, it was roughly 22-odd pages, but you looked at it and studied it, didn't you?

A. Yes, sir.

Q. And you found that to be a one-sided and slanted picture of what you had told them over three succeeding—three previous interviews; is that correct?

A. Yes, sir.

Q. To you, this did not reflect what you had told them; isn't that true?

A. Yes, sir.

Q. And there proceeded as a result of your concern that this did not reflect what you had told them, there proceeded an effort, as a matter of fact you told them you would not present this testimony to the Grand Jury; is that correct?

A. Yes, sir.

Q. And there proceeded, didn't there, a marathon session with the Postal inspectors, didn't you, in which you had to go through this word by word and line by line to review it; is that correct?

[1811]

A. Yes, sir.

Q. In fact, that session with Mr. Kormann and Mr. Hartman went well until the evening hours until 1:00 a.m. the night before you were in the Grand Jury; is that correct?

A. That's what I recall, yes, sir.

Q. Now, it is true as well, sir, isn't it, that Mr. Valder was there up until he left at some period of time to go home late in the afternoon of that July 15?

A. I don't recall the time Mr. Valder left.

Q. But he did leave; is that correct?

A. I recall he did leave before we finished, yes.

Q. And that left the continuing effort to review this statement to you, your lawyer, Mr. Hartman and Mr. Kormann; is that correct?

A. Yes, sir.

Q. And it is true as well, isn't it, sir, that Mr. Kormann and Mr. Hartman made it very clear to you that they didn't went you to make any changes in this statement; is that right?

A. They were resisting all changes, I will say that.

Q. As a matter of fact, they got quite angry at you, didn't they?

A. A few times words were a little louder than [1812] normal.

Q. Mr. Hartman raised his voice at you and your lawyer, didn't he?

A. As I recall, he did.

Q. And as a result of that effort, isn't it a fact, sir, that you and your lawyer when you ultimately came and testified the next day in the Grand Jury, isn't it a fact that you and your lawyer actually presented a certain list of questions to Mr. Valder that you felt should be asked of you in the Grand Jury in order for there to be a realistic picture of what you knew to be the truth; isn't that true?

A. Yes, sir.

Q. And as a matter of fact, when you went into the Grand Jury, Mr. Valder didn't ask you those questions, did he?

A. Not all of them, no, sir.

Q. Finally, sir, isn't it true that you and your lawyer actually took the draft statement, and went over it yourselves and added a paragraph at the end of it that you wished to be part of the testimony, didn't you?

A. We added several things to that document that we wanted to be part of the testimony.

Q. And that was in either your own handwriting or the handwriting of your lawyer; is that correct?

[1813]

A. Yes, sir.

Q. And you gave that to Mr. Valder, didn't you?

A. Yes, sir. We discussed it. We ultimately gave it to Mr. Valder; that's correct.

Q. Because they wouldn't allow to you keep a copy of this, would they?

A. That's correct.

Q. As a matter of fact, that final paragraph that you prepared said that neither you nor, to your knowledge, Mr. Moore nor Mr. Reedy knew about illegal pay-offs to Mr. Voss; is that correct?

A. I can't remember exactly what that last paragraph said. I know we wanted that to be part of my Grand Jury statement. I don't remember where in the document that we wanted that to be.

Q. That's right. And sir, looking at Exhibits 89 and 90, neither one of 89 being the draft statement, 90 being the ultimate statement, neither one of those, sir, is the one that you and your lawyer worked on, wrote on and gave to Mr. Valder?

A. That's correct.

Q. MR. KRAKOFF: No further questions, your Honor.

At this time—

THE COURT: Just a second. I'm a little confused. I'm looking at 89 and 90 and there's a lot of * * *

* * * * *

[1832]

THE COURT: The 16th, I'm sorry.

BY MR. VALDER:

Q. On the 16th you had the updated version and an opportunity to make changes again?

A. Yes, sir.

THE COURT: I want to know, on the morning of the 16th, were you presented with Reedy 90?

THE WITNESS: Yes, sir. A new, retyped draft; that's correct.

THE COURT: Any discussion of the other matter which you had requested the night before?

THE WITNESS: I don't recall it that was brought up again or not, your Honor. If was pretty much said—

THE COURT: What do you mean the Postal inspectors refused to accept your statement? What do you mean by that?

THE WITNESS: They refused to make the additions and many of the changes that we wanted to make.

THE COURT: In what way did they refuse?

THE WITNESS: They said no, we won't allow the change to be made. They controlled the document, your Honor. They were the ones that were charged—with first preparing the statement, between Mr. Valder and the inspectors, I don't know who had the actual responsibility, but they

controlled the document and they [1833] controlled the changes.

THE COURT: All right, sir.

BY MR. VALDER:

Q. Mr. Bray, in connection with the paragraph or the information you wanted to add, have you had occasion to review counsel's notes to recall what that was?

A. Yes, sir, I have.

Q. And what was it, sir?

A. I just testified a while ago—

THE COURT: I want to hear that again. What is it that you wanted added that was not added?

THE WITNESS: I recall that what we wanted added was that the statement that Mr. Moore and Mr. Reedy and I never discussed any payments from Gnau and Associates to Mr. Voss at any time outside of the presence of counsel. And as I recall—I couldn't recall a moment ago, I thought there was something else in that paragraph. I believe now it had to do with the fact that Mr. Moore or Mr. Reedy never told me that I was not to tell anyone that Mr. Voss recommended Gnau and Associates as consultants. That was basically it.

MR. VALDER: Would you say that again, please?

THE WITNESS: That Mr. Reedy never told me not to tell Mr. Moore, and Mr. Reedy never told me that I should not tell anyone that Mr. Voss recommended—that I * * *

* * * * *

[1939]

A. Yes, sir.

Q. Now, isn't it true as well, sir, that the fundamental point that you disagreed with the inspectors on that you wanted to have in that statement was simply this: That you, Frank Bray, did not know that Peter Voss was being paid by John Gnau and to your knowledge neither did Bill Moore nor Bob Reedy? Isn't that true?

A. I believe that's true, yes.

Q. And isn't it a fact as well that that most fundamental point in this case was not put into your statement by Mr. Hartman or Mr. Kormann under the direction of Mr. Valder? Isn't that true?

A. It is true.

MR. KRAKOFF: Now, sir, and that statement, just so the record is clear, your Honor, Mr. Bray has just testified about is marked as Government Exhibit—excuse me, as Reedy Exhibit 90.

THE COURT: This is a new designation?

MR. KRAKOFF: No, your Honor, just so the record is clear, for the reporter.

BY MR. KRAKOFF:

Q. Sir, it is true as well, isn't it, that the following day, as you testified, your lawyer presented certain questions on your behalf to Mr. Valder to be asked of you in the Grand Jury that in order to make a clear and * * *

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RULE 6e MATERIAL ENCLOSED

DETAILS OF OFFENSE

[Shield omitted] POSTAL INSPECTION SERVICE

RESTRICTED INFORMATION

Summary

BACKGROUND

Between 1970 and 1980, USPS funded research and development contracts with REI totaling approximately $50 million. REI developed a MLOCR and sold 5 prototypes to USPS for approximately $20 million. The USPS experience with REI was marred by cost overruns, delays in delivery of contracted services and unsatisfactory performance of machines after installation. Partly as a result of its REI/MLOCR experience, USPS concluded the proper automation strategy was deployment of SLOCRs, in combination with customer application of ZIP+4, and purchased SLOCRs from Burroughs and Pitney-Bowes. REI officers William Moore (President & Chairman of Board) and Robert Reedy (Vice President–Marketing) strongly opposed the USPS SLOCR strategy.

In mid 1981, William Spartin was employed at the White House as Deputy Director of Presidential Personnel. There, he met John Gnau, former Reagan Campaign Chairman for Michigan. In 1983, Spartin became President of MSL, an executive recruiting firm, and began trading clients with Gnau who had formed a small governmental consulting (influence peddling) firm. Michael Marcus was Treasurer of Gnau's firm (GAI).

CONSPIRACY

In late 1982 Gnau contacted USPS Board of Governor (BOG) member Peter Voss relative to a real estate transaction between USPS and a Gnau client (Durant). By January 1984, Gnau agreed to compensate Voss for client referrals. In exchange, Voss agreed to assist Gnau's clients in obtaining USPS contracts/business. At its January 1984 meeting, USPS BOG authorized

the purchase of new generation SLOCRs. REI and ECA teamed with foreign partners and competed for the new contract.

In June 1984, Voss informed Texas Congressmen Martin Frost and Jack Brooks of his support for the USPS purchase of MLOCRs from REI. Neal Gregory, REI lobbyist (Hill and Knowlton, one of the world's largest), gave REI President Moore a copy of Voss' letter to Congressman Brooks. At about that time, Congressman Frost's office furnished Moore a "confidential" USPS BOG transcript. There ensued during July and August a series of telephone calls between Voss and Moore including a 22.6 minute call on July 6, 1984. On July 10, the USPS SLOCR contract was awarded to ECA. REI had lost the competition and, as a result, had no prospect of receiving USPS contracts in the forseeable future.

Voss, however, had other ideas. On September 3, 1984, while on a BOG trip to Dallas, T, Voss met secretly with Robert Reedy of REI. At that meeting, Voss told Reedy to hire Gnau's firm (GAI) to represent REI with the USPS. Reedy and Gnau met on October 12, but did not sign a contract until early 1985. Voss and Gnau complained to Moore and Reedy about the delay. Toll records, telephone logs, and Moore's notes reflect ongoing telephone contact between Moore and Voss, Reedy and Voss, Reedy and Gnau from September 4 through the end of 1984. In November 1984, Gnau introduced Spartin and Voss to each other. Gnau sent a letter to Reedy identifying Spartin as President of GAI.

In January 1985, Paul Carlin was appointed PMG with the support of Peter Voss. Gnau and Marcus met with Moore and Reedy and told them REI would have a USPS contract within 90-120 days. Gnau and Reedy

signed a contract wherein REI would pay GAI $30,000 (three equal payments) plus expenses and a bonus equal to 1% of any USPS contract awarded to REI. Gnau, Marcus, Spartin and Voss agreed to divide the 1% bonus among themselves. In addition, Gnau paid Voss 1/3 of REI's $30,000 payment. Over the next several months, Gnau, Marcus, Spartin and Voss orchestrated circumstances and events to REI's benefit.

At every USPS BOG meeting during 1985, Voss urged USPS to terminate its (July 1984) contract with ECA and award a sole source contract to REI. With Voss on their side, REI made presentations (sales pitches) to USPS at Washington in March and at Dallas during April and May 1985. Marcus began authoring reports analyzing REI equipment and USPS policy which were shaded to REI's advantage. Voss presented these reports to the USPS as if they were his own independent work product. During this time, REI lobbied several Congressmen to pressure USPS into purchasing equipment from REI. REI drafted letters which Congressmen sent to USPS. Reedy and Moore worked with Congressman Frost to draft an amendment to a USPS appropriations bill which, if passed, would have prevented release of funds to USPS until REI obtained a USPS contract. At about the same time, in July 1985, REI arranged through Marcus to introduce a contracting consultant to the USPS BOG. The consultant met with the BOG and advised them it was proper to award a sole source contract. The consultant failed to disclose to USPS BOG that he was under contract to REI.

CARLIN FIRED/CASEY HIRED

By late summer, Gnau et al. and REI were frustrated by the lack of progress in receiving a contract award. Gnau, Marcus and Spartin met at REI on August 29, 1985 and negotiated new terms with Reedy. REI agreed to pay GAI $22,000 monthly, including expenses, for his continuing efforts to get a USPS contract for REI. Gnau et al. and REI's Moore and Reedy had discussed for months that PMG Carlin and his senior assistant James Jellison were personally responsible for REI's failure to get a contract. REI cooperated with Voss' and GAI's efforts to get rid of Carlin and Jellison at the same time REI agreed to compete with ECA for a new USPS automation contract valued at $250-400 million. Voss' advocacy (bribery) resulted in REI's renewed eligibility for a contract only 12 months after they had lost all chance of future USPS business. Gnau, Voss, Moore and Reedy were determined to win this competition.

By fall 1985, Spartin began paying (bribing) Voss with airline tickets for recruitment contracts at the USPS. Gnau was paying (bribing) Voss in cash for his efforts to defraud the USPS of a fair and unbiased procurement. Spartin knew that Carlin would be replaced soon and in early December Voss directed Spartin to begin a search for Carlin's replacement. Spartin notified Gnau and contacted REI President Moore to discuss the search and solicit candidates favorable to REI. Moore recommended Albert Casey to Spartin. Casey was interviewed by Spartin in December 18 and by Voss/McKean (Chairman–USPS BOG) on January 2, 1986. Carlin was fired and Casey hired on January 6, 1986. Three days later, Casey discussed senior level management changes with Spartin including the planned

reassignment of James Jellison. That evening, Moore, Reedy, Gnau and Spartin met to celebrate their success in getting rid of Carlin and Jellison.

Over the next several months Reedy and Moore talked with Spartin regularly about strategy for getting a USPS contract for REI. Moore and Reedy began to exhibit frustration at Voss' inability to deliver the contract they had worked (bribed) so long to get. Spartin assured them it would happen. By March 1986, however, USPS BOG learned of Spartin's dual role with MSL and GAI and on March 3, 1986 confronted Voss and Spartin. Spartin lied to the USPS BOG about this relationship with Gnau and attempted to cover-up his role in the REI/Voss (bribery–mail fraud) affair. Gnau, Spartin, Reedy and Moore talked during the next few weeks to solidify their version of the events. Their attempted cover-up proved futile when Spartin agreed to cooperate with the US Attorney and Postal Inspectors.

The purpose of this summary is to highlight evidence of William Moore's, Robert Reedy's and Recognition Equipment Inc.'s knowing and willful participation in: (1) a conspiracy to defraud the U.S. Government (USPS) of the loyal and faithful services of Peter E. Voss, and its right to conduct a fair and unbiased automation procurement (Title 18 USC 371); (2) bribery (Title 18 USC 201) and a conspiracy to bribe a government official; (3) use of the U.S. Mail in furtherance of a fraudulent scheme to obtain a multi-million dollar USPS contract (Title 18 USC 1341); and (4) aiding and abetting (Title 18 USC 2) the above listed offenses.

The evidence is divided into four categories, as follows:

I. This section lists Voss' official influence and actions which were known by the USPS and REI officials Moore and Reedy. These actions, primarily the continued high intensity of Voss' oversight and intervention, caused observers to be suspicious of Voss' motive.

II. Section II lists events and transactions relative to Voss' and GAI/REI actions which were *unknown* to *USPS officials* but *known* to *REI*. If this information had been known to USPS officials, Voss would have been confronted and his influence on the program (procurement) would have been halted. When coupled with the events listed in Section I, this evidence indicated that Moore and Reedy should have known that Voss *et al.* defrauded the U.S. Government (Post Office).

III. Section III lists events, comments and notes which indicate that Moore, Reedy and REI in fact knew that Voss, Gnau, Spartin and Marcus were conspiring to defraud the USPS, that Voss was somehow compensated for his influence, and that Moore, Reedy and REI knowingly participated in and furthered the conspiracy.

IV. Section IV lists independent "bad faith" initiatives developed by Moore and Reedy which our indicative of REI's intent and rebut REI's contention that they were only

endorsing what is right for the USPS and the mailing public.

I. *Peter Voss' official actions, known to USPS officials and Reedy, Moore and REI, which improved REI's position or furnished REI an opportunity to obtain a USPS MLOCR contract* are detailed below.

The intensity of Voss' attempted influence and participation in the MLOCR matter is justification in itself for suspicion and concern relative to his motive. USPS management and members of the Board of Governors did, in fact, question Voss' motive, but did not have enough information to confront or stop Voss.

08/84 - 02/85	-	Voss maneuvered himself onto the Technology and Development Committee
01/85 - 03/86	-	Peter Voss: Influenced Ruth Peters, Chairman of the Technology and Development Committee to endorse and actively promote REI's product (MLOCR)
Jan - Mar 1985	-	Caused the USPS to abandon a plan to achieve multi-line read (if necessary) by awarding retrofit contracts to REI competitors (Pitney Bowes, Burroughs, ElectroCom Automation)

Feb - May 1985	-	Influenced committee chairman Ruth Peters to schedule March, April and May 1985 meetings between USPS managers, the Technology and Development Committee and REI
Apr - Jun 1985	-	Steered USPS managers, and primarily Governor Peters, away from Electro-Com Automation
	-	Recommended at one point that the Phase II ECA SLOCR contract be canceled
May 1985	-	Recommended to USPS management, via a highly technical memorandum signed by Peters and the committee, that the USPS deploy MLOCRs by awarding an immediate MLOCR contract to REI (mid-course correction suggested)
June 1985	-	Directed the DPWG to purchase 90 MLOCRs sole source from REI ($162 million)
July 1985	-	Caused management to implement the mid-course correction
	-	Moved for Jellison's removal when Strange mistakenly re-

		ported information furnished her by Jellison
Jul - Aug 1985	-	Adamantly opposed developmental funding, developmental time period and competitive testing program in general
Aug 1985	-	(To implement the mid-course correction, USPS management developed a competitive MLOCR procurement program which did not include funding, but did include a shortened developmental period. The program made REI eligible for a $250 - $400 million award.)
	-	Argued against the competitive program and recommended an immediate award and continued his relentless pressure to influence such an award
Sept 1985	-	Recommended a joint Audit/ Technology and Development Committee meeting to influence additional Governors to support a sole source award to REI

Oct 1, 1985	-	(Joint Audit/Technology and Development Committee meeting)
	-	Furnished a briefing document that recommended an immediate award to REI
Oct 15, 1985	-	Caused Governor Sullivan, Audit Committee, to write to Carlin and asks if sole source is economically justified in light of REI's inability to obtain proprietary data from ECA for retrofit (Phase IIA)
Nov 1985	-	Submitted a letter to Carlin and the Board of Governors from the Technology and Development Committee responding to Carlin's response to Sullivan—again recommend immediate award
Dec 1985	-	Supported an immediate test which he believed would favor REI

- During a closed Board of Governors session, Voss and the Technology and Development Committee moved for Carlin's removal, primarily as a result of the automation program

Jan - Feb 1986 - Attempted to influence management to move test site from Phoenix to Dallas—a move which would greatly benefit REI because they had five years of directory experience in Dallas

Mar 3, 1986 - During a closed Board of Governors meeting, Voss *denied* knowing that Spartin was associated with Gnau and Associates and stated he had no contact with Gnau and Associates after referring them to the Postmaster General

1/85 - 3/86 - *Summary.* As a result of Voss' influence, MLOCRs received an inordinate amount of attention during each Board of Governors meeting

- Such activity is highly unusual for a Governor (Director) of any entity, especially one with $30 billion in revenue and 800,000 employees

- Voss' arguments were buttressed by a number of highly technical memoranda which supported an

immediate MLOCR award to REI. The memoranda were reportedly authored by the Technology and Development Committee and developed during independent research

- During July 1985, Jackie Strange remarked to the Chief Postal Inspector that no individual would go to the extremes that Voss had gone to without some personal gain

II. The following actions of Gnau and Associates, Inc. and Peter Voss, *were unknown to USPS officials, but known to Reedy, Moore and REI.* When coupled with Voss' known USPS influence (Section I), these actions should cause a reasonable person to "know" that Voss conspired to defraud the USPS.

07/02/84 - Voss' office furnished Board of Governors transcript to Congressman Frost's office

07/06/84 - Voss/Moore 22 minute telephone conversation

07/09/84 - Voss' office contacts Moore's office to warn of apparent result of ongoing Board of Governors/USPS management policy deliberations and offers advice for REI to reverse negative decision

August 1984 - Voss/Reedy 17 minute telephone conversation

09/03/84 - Voss meets privately with Reedy after Bolger/McKean cancel the REI/Technology and Development Committee meeting that Voss initiated

- Voss recommends that REI hire Gnau and Associates

11/09/84 - REI learns that William Spartin is the President of Gnau and Associates

Nov - Dec 1984 - Voss shows extraordinary interest in recommended REI/Gnau and Associates relationship by contacting Moore on at least two occasions and Reedy at least once to *reinforce* his *recommendation* and *question why* REI had not yet hired Gnau and Associates. Voss also furnished Moore advice relative to Carlin

January 1985 - Gnau reports in REI that he will obtain an MLOCR contract in 90-120 days through the support of Voss and the Technology and Development Committee. (William Moore/REI had been unsuccessful in obtaining same for the past two and one-half years.

- Gnau and Associates would receive a 1% commission if the MLOCR contract was obtained

03/05/85 - Prior to presentation to USPS, Gnau informs Reedy that the remaining Governors do not have to know that Voss and Gnau know each other

03/27/85 - Spartin, during a meeting with Moore and Reedy, reinforced Gnau and Associates' close relationship with Voss; over the course of their relationship, Spartin remarked to Reedy that Voss was in his hip pocket

Mar-May 1985- Reedy and Moore observe Voss' deceptive actions before USPS officials relative to his acquaintanceship with Gnau, Marcus and REI officials

- Reedy and Moore also realize that a critical member of Gnau and Associates (William Spartin) does not accompany REI/Gnau and Associates during USPS meetings

- Reedy knows that Marcus is authoring Technology and Development Committee findings and recommendations furnished to the Board of Governors and USPS management. He also is aware that the material is submitted through Voss and that Voss is manipulating Peters. These materials included arguments against retrofit, for an immediate award to REI,

recommendations for joint Audit/ Technology and Development Committee meetings, and movement of test site from Phoenix to Dallas.

03/85 - 03/86 - Moore, Reedy and REI are furnished the content of closed Board of Governors and USPS management meetings and deliberations; Voss also furnished Gnau and Associates the content of Electro Com Automation's MLOCR pricing and delivery proposals; Gnau and Associates furnished same to REI

07/85 - 03/86 - Reedy and Moore know that Spartin had received USPS executive recruitment contracts

07/08/85 - Reedy and Moore know that REI consultant Terry Miller has an opportunity to influence the Technology and Development Committee

08/29/85- 03/03/86 - That Spartin would place (or attempt to place) USPS managers that would be "friendly" to REI/Gnau and Associates

08/85 -12/85 - That Voss sought Carlin's and Jellison's removal because they did not favor immediate award to REI

- That despite the fact that REI signed a competitive test agreement, they aggressively (through Voss) pursued a sole source award

and undermined the competitive approach

11/04/85 - That Voss sought, and REI furnished, questions for Voss to ask REI and ECA during a presentation to the Board of Governors'; Voss furnished REI (through Marcus) a copy of ECA's written presentation

December 1985- That Spartin, an REI consultant, had a contract to replace Carlin

- That REI's recommended replacement (Al Casey) would become Postmaster General

03/85 - 03/86 - That there was a cover-up relative to Spartin's association with Gnau and Associates/REI/Voss which culminated in expressed misrepresentations to the Board of Governors, Postmaster General and Postal Inspectors

III. The below-listed events, comments and notes are evidence that Moore, Reedy and REI in fact knew that Voss *et al.* were conspiring to defraud the USPS, that Voss was somehow compensated for his influence, and that Moore, Reedy and REI knowingly participated in the conspiracy.

- Moore, Reedy and REI agreed to hire a three-man lobbying firm when they already retained a large international firm to further their USPS sales efforts

- The fact they they withheld their association with Gnau from their other consultants
- During their first meeting in October 1984, when *Gnau told Reedy not to use Voss' name but rather to refer to Voss as "our friend," Reedy said "I understand."*

April 29, 1985

- Moore's diary: *Consultant wired - (Peter Voss)* [corroboration of Spartin's statement to Reedy - "Voss is in my hip pocket."]

May 1985

- Reedy asked Gnau on two occasions, *"What is your arrangement with Peter Voss?"* (Reedy did not ask 'do you have an arrangement?' but rather 'what is it?')
- Gnau replied, *"It's better you not know what my relationship with Peter Voss is."* (Reedy did not pursue details of what appeared to be an acknowledgment of a compensatory relationship and thereafter continued to exploit the relationship

July 1985

- Reedy's and Moore's comments to at least Marcus and Spartin, *"Why don't you get Peter Voss to order sole source, etc.?"*

August 29, 1985

- During a meeting at REI, Spartin outlines the significance of his position as an executive recruiter for the USPS and consultant for REI

- Gnau and Associates, with REI's support and Voss' influence, initiated a campaign to remove Jellison and Carlin
- Reedy suggested, and Moore authorized, a $6,000 per month general public relations contract for services that were apparently unnecessary and accordingly never requested (they did so with token 'staged' input from their communications department).
- Spartin and Marcus will testify that Reedy "carved out" the $6,000 for William Spartin relative to Spartin's executive recruitment capabilities at the USPS. Evidence supporting their conclusion is the fact that shortly prior to the August 29, 1985, meeting, *Reedy asked Spartin if he was paid relative to the REI/Gnau and Associates agreement.* Spartin replied "no" but told Reedy he intended to share in the 1% commission.
- At the same time (August 29, 1985, which was after REI's agreed upon participation in a formal USPS competitive testing program) when REI's apparent legitimate need for Gnau and Associates was lessened, Moore and Reedy authorized a $16,000 nonrefundable draw on the 1% commission
- Reedy remarked in Marcus' and Gnau's presence that "You have a lot of people to take care of."

November 20, 1985

- *When specifically asked by Postal Inspectors, Moore and Reedy denied any contact with individual Board of Governors members*

January 9, 1986

- Moore, Reedy, Spartin and Gnau meet at Washington, DC to celebrate their success and *develop a strategy to capitalize on Casey's appointment*
- William Spartin, holder of a contract to locate a permanent Postmaster General and planned recipient of three senior level searches [known to REI], becomes the central figure in REI's sales strategy. Reedy telephoned Spartin on at least 20 occasions during the subsequent two-month period.
- Moore's diary: "30 - 45 days into mission - Al out to make decision"
- Reedy actively participated in the conspiracy to conceal Spartin's GAI/REI association by placing a *'bcc:' to Bill Spartin* on a January 10, 1986, letter addressed to John R. Gnau which was intended for submission to the USPS to support a sole source award

Jan-Feb. 1986

- *Moore and Reedy complain to Spartin about lack of progress in obtaining a sole source award.* [This statement is enlightening coming from a vendor that went from ineligible for a MLOCR award for several years to eligible for a $250-$400 million award within the year and was successful in removing the Postmaster General and Senior Assistant Postmaster General they believed were standing in their way].

March 1986

- During March 1986, Moore and Reedy, with the knowledge of an official investigation, *affirmatively agreed to participate in a cover-up relative to Casey's selection and Spartin's association with Gnau and Associates*

April 8, 1986

- When specifically asked by Postal Inspectors, *Robert Reedy lied about his identification and introduction to Gnau and Associates as a consultant*
- During the interview by Postal Inspectors, Reedy knowingly withheld information relative to the Spartin/REI/Gnau and Associates relationship, including Moore's recommendation of Casey, when he in fact knew the relationship was a subject of the investigation. After the interview, Reedy in fact telephoned Spartin.

July 1986

- When interviewed under the terms of a *Kastigar* letter, Reedy and Moore lied concerning their knowledge of Voss' influence on their behalf and could not explain or recall the significance of Moore's notes relative to Voss' actions (July 9, 1984) and the appointment of Casey (30 - 45 days into mission, Al out to make decision).
- Moore and Reedy consciously downplayed Spartin's role as a consultant to REI and his participation in their MLOCR sales effort. [There is substantial evidence to rebut their

minimization of Spartin's role, a role in which REI apparently feels exposure.]

IV. Moore's, Reedy's and REI's intent to defraud the USPS is evident in the following events and transactions that related to Voss' official influence but were independently initiated by Moore and Reedy.

- On or about July 25, 1985, at Moore's and Reedy's suggestion and with their substantial input relative to its drafting, Congressman Frost proposed an amendment to a USPS appropriate bill that in effect would freeze USPS revenue until MLOCRs were purchased from REI.

- On or about August 16, 1985, Reedy, on behalf of REI, executed a written agreement to compete in the Phase IIA and III MOLCR procurement. Phase IIA involved a program to retrofit the Phase II ECA/AEG SLOCRs to multi-line read, and Phase III involved a program to obtain new stand-alone MLOCRs. At the outset, REI was advised that the USPS could not furnish proprietary data and materials relative to the ECA/AEG SLOCR.

- There is evidence in the form of Moore's diary, Colquhoun's and Bray's notes and Bray's testimony that Moore developed and instituted a strategy to discredit and circumvent the Phase IIA program. Moore did so by requesting unnecessary and highly proprietary data from ECA/AEG to make them say "no" to REI's request. REI then intended (and did so) to cry "foul" and label the Phase IIA program sole source so that they could force a corresponding

sole source for Phase III. (Voss offered inside support through his "staged" Audit/Technology and Development Committee meeting.)

- Additional evidence of Moore's independent bad faith initiative was a meeting with AEG officials wherein he allegedly offered AEG an opportunity to split the contract. Moore reportedly told AEG that he would have Phase IIA canceled if they did not 'play ball.' AEG refused and reported Moore's comments to USPS officials.
- During the period August 1985 to April 1986, REI continued to undermine the competitive testing program via the media and Congress.

* * * * *

UNITED STATES POSTAL SERVICE
POSTAL INSPECTOR
SPECIAL INVESTIGATIONS DIVISION
WASHINGTON, DC 20260-2112

Date: February 18, 1988
REF: IS010:MCHartman:sh
Case No.: 461-0901714-F(1)
Subject: DETAILS OF THE OFFENSE
To:

Introduction

The purpose of this memorandum is to detail evidence of William Moore's, Robert Reedy's and Recognition Equipment Inc.'s knowing and willful participation in: (1) a conspiracy to defraud the U.S. Government (USPS) of the loyal and faithful services of Peter E. Voss, and its right to conduct a fair and unbiased automation procurement (Title 18 USC 371); (2) bribery (Title 18 USC 201) and a conspiracy to bribe a government official; (3) use of the U.S. Mail in furtherance of a fraudulent scheme to obtain a multimillion dollar USPS contract (Title 18 U.S.C. 1341); and (4) aiding and abetting (Title 18 USC 2) the above listed offenses.

Key Players

William Bolger	–	Postmaster General (PMG), 1978-1984 (retired)
Frank Bray	–	REI Manager, Postal Programs
Jack Brooks	–	U.S. Congressman (Texas)

Paul N. Carlin	–	Postmaster General, January 1985 - January 6, 1986 (fired by Board of Governors)
Albert Casey	–	Postmaster General, January 6, 1986 - August 1986 (hired by Board of Governors as interim PMG)
William Chapp	–	Effective July 12, 1985, replaced Jellison and Strange as the USPS day to day manager of Automation Program
Phil Colquhoun	–	REI Vice President, Manufacturing
Robert Crandall	–	Al Casey's successor at American Airlines, REI Director
Edie Fraser	–	Officer of Miner and Fraser Public Affairs Inc., a Washington, DC, PR consultant that leased space from GAI, traded clients with Spartin and obtained USPS contracts to: (1) manage PR relative to appointment of Casey as PMG; and (2) conduct an audit of USPS Communications Department.
Martin Frost	–	U.S. Congressman for REI's district
John R. Gnau	–	GAI chairman; owner of Gnau and Associates Inc. (GAI)

Neal Gregory	–	Hill and Knowlton consultant who worked closely with REI (Moore) relative to USPS and Congress
David Harris	–	Secretary, USPS Board of Governors
James Jellison	–	Senior Assistant PMG (SAPMG)-Operations Director of USPS Automation Program
Michael B. Marcus	–	GAI Vice President, Treasurer
Bonnie Mclellan	–	Texas Congressman Martin Frost's Legislative Director (1981 - January 1985)
William G. Moore	–	REI President and Chief Executive Officer (3/1/82) and Chairman of the Board (2/28/85); member of four man REI Management Committee
Ruth O. Peters	–	Member of USPS Board of Governors and Chairman of the Technology Committee
Sharon Peterson	–	Peter Voss' executive assistant and officer of Decision Systems Inc. The USPS reimbursed Voss for work Peterson reportedly performed on behalf of Board of Governors ($600 per month).
Robert Reedy	–	REI Vice President, World Wide Marketing; member of

four man REI Management Committee

Ray Renola	–	retired USPS manager; and consultant to REI during 1984
Israel Sheinberg	–	REI Executive Vice President and member of Management Committee
William Spartin	–	GAI and MSL International Consultants Inc. (MSL) President
Jackie Strange	–	Deputy PMG for Carlin and Casey
Peter E. Voss	–	Member, USPS Board of Governors, Technology and Development, Contingency and Planning and Resource Committees; owner of Decision Systems Inc.

* * * * *

ARGUMENTS FOR INDICTING THE CORPORATION

GIVEN:

WILLIAM G. MOORE, JR. REI's Chairman of the Board, Chief Executive Officer and President, actively oversaw the USPS marketing effort.

ROBERT W. REEDY, REI's Senior Vice President for Marketing, a member of REI's four man Management Committee and Moore's right-hand man, was responsible for day to day activity.

REEDY, in writing, proclaimed that the USPS MLOCR contract was "far and away" his number one marketing priority.

REI, the corporation, stood to gain a great deal if awarded a USPS MLOCR contract.

CONCLUSION:

This is a case of an underlying corrupt corporate management strategy to obtain USPS business rather than the isolated and independent overzealous actions of two corporate officers.

BASIS:

1. Independent of Voss/GAI actions, the corporation and its PAC funded a media and political campaign to discredit USPS management and cause financial harm to USPS, for example:

a. staged questions and testimony before Congress

b. Frost amendment to freeze USPS appropriations bill.

2. Corporation, with knowledge and consent of General Counsel and Chief Financial Officer, bankrolled three-man Michigan firm based primarily on their relationship with Voss, a government official, as follows:

a. $295,000 cash

b. 1% contingency fee (potential $4 million)

c. $16,000 non-refundable monthly draw

d. $6,000 per month for Spartin's USPS personnel influence (disguised as general PR contract).

3. REI officers have been less than candid during interviews and grand jury appearances:

a. Barker - PR contract

b. Sheinberg - significance of USPS business

c. Colquhoun - circumvention of Phase II-A contract

d. Kelly - MSL.

4. On April 8, 1986, in the presence of REI General Counsel, REEDY

lied to Postal Inspectors relative to his introduction to GAI. REEDY advised the Inspectors, at first, that he could not recall and then attributed the introduction to a third party. REI has since reported that the General Counsel was aware, at the time of the interview, that Voss had introduced Reedy to GAI. Neither REI nor its General Counsel voluntarily corrected the lie.

5. REI and its counsel agreed to the interview of MOORE, REEDY and Bray only under the terms of a Kastigar letter and 3 1/2 months after the interview was requested.

6.

REDACTED Rule 6e Materials

7. REI endorsed Moore's actions by awarding him a 1986 compensation package which exceeded $1 million and a January 1987 cash bonus in excess of $400,000. The corporation's net income approximated $10 million.

8. The REI Board of Directors has made no move to investigate MOORE and REEDY's activities or to take appropriate action. MOORE's diaries, on their face, reflect knowledge of USPS proprietary information, inside policy and personnel deliberations, and Voss' relationship with Gnau ("wired"). When interviewed, the Directors denied such knowledge.

9. A 1977 grand jury investigation disclosed that a REI consultant entertained USPS officials to obtain confidential information. He reported the nature of his expenses and information gathered on his expense vouchers. REI directed him not to include the names of USPS employees on his vouchers, but he continued to present the information gathered. Postal employees were fired, but prosecution was declined.

STRATEGIC REASONS FOR INDICTING THE CORPORATION

1. Admissibility and probative value of evidence:

a.

REDACTED Rule 6e Materials

b. Marcus, Gnau et al in some instances can conclusively testify that REI (Moore, REEDY and/or Bray), but not MOORE or REEDY individually, were aware of Voss' corrupt actions and the exchange of confidential USPS information.

c. The most critical Marcus/REI authored document and its transmittal letter, which reflected its surreptitious submission to USPS as Voss' independent work product and Technology Committee recommendation, was definitely shown to Bray.

2. If we indict the corporation the USPS and Civil Division of the US Attorney will have greater flexibility and likelihood of success in pursuing civil remedies and penalties against REI.

3. Indictment of the corporation will furnish the government a lever for plea negotiations.

4. Indictment of the corporation will send a proper and needed message to Corporate Directors and Officers that engage in or are considering the corrupt purchase of government influence via third party consultants, and will promote an active stewardship function by Corporate Boards.

Even where no single employee had knowledge that all elements necessary to complete the offense had occurred, a corporation may nevertheless be found criminally liable because the "collective knowledge" of all its employees is imported to the corporation. *United States v. T.I.M.E. - D.C., I 381 F. Supp. 730, 738 (W.D. Va 1974),*

Island Freight v. United States 191 F.2d 313 (10th Cir. 1951).

State of Texas

Dallas of County

AFFIDAVIT OF WILLIAM G. MOORE, JR.

I, William G. Moore, Jr., state that the following affidavit is made based on my own personal knowledge based on information I know, saw, heard or experienced, and is true and correct as written.

1. I reside at 4720 Northaven Road, Dallas, TX 75229. My date of birth is April 12, 1939. I am under no legal disability which would render me incompetent to make this affidavit.

2. I am submitting this affidavit in opposition to the Motions of the United States and Postal Inspector Defendants for Summary Judgment.

3. I was born in Washington, D.C. My father was a private in the D.C. Fire Department, and my mother worked for the National Labor Relations Board. I graduated from St. Francis Xavier grade school in Southeast Washington and Gonzaga High School near Capitol Hill. I attended Georgetown University on a baseball scholarship (where I was captain of the team) and received a bachelor's degree in 1961.

4. Upon graduation from Georgetown in June 1961, I accepted a Regular Army (RA) commission, completed infantry officers' basic course at Fort Benning, Georgia and graduated from both Airborne and Ranger courses. I then reported to Schofield Barracks, Hawaii where I served as a platoon leader, rifle company commander and brigade operations officer during my three year assignment with the 25th Infantry Division. Deployments included Okinawa, Thailand and South Vietnam. My awards included the Army Commenda-

tion Medal, the Expert Infantryman's Badge and several unit citations won by my unit, the 27th Infantry "Wolfhounds."

5. In October 1965, I returned to the Washington, D.C. area and resigned my Army commission to take a job with the Chesapeake and Potomac Telephone Company of Maryland. I was recruited into the Bell System's Initial Management Development Program (IMDP), a fast track program designed to move successful participants to mid-management within 5-7 years time. Within a year, I was promoted and subsequently transferred to Bell Labs in Newark, New Jersey. Two years later, I was again promoted, thereby reaching mid-management in less than three years as compared to the anticipated 5-7 years. Two years later I left Bell Labs to begin a career in the commercial computer industry.

6. In the spring of 1971, I joined Boston-based Inforex, Inc. as their branch sales manager in Cincinnati, Ohio. During seven years with Inforex, I held jobs as branch manager, regional manager, manager of United Kingdom operations, and vice president, sales. I spent my last two years (1976-78) as vice resident-domestic operations. In 1978, I became president of another Boston high tech company, Infoton, Inc., and directed its emergence from bankruptcy. I then joined the Perkin-Elmer Corporation, whose total sales were in excess of $1 billion, as vice president, general manager and corporate officer. Once again, my task involved turning around an under-performing business unit. Three years later, in early 1982, I was recruited to be the chief executive officer (CEO) of Recognition Equipment Incorporated (REI) in Irving, Texas.

7. My entire career focus since leaving the Army in the mid-1960's had been to progress through a series of sales, marketing and general management assignments with the goal of becoming CEO of a substantial, New York Stock Exchange (NYSE) company. REI was the culmination of that ambition.

8. There was considerable risk associated with REI at the time I joined it. The company had sustained a series of successive unprofitable quarters. Its balance sheet was heavily debt laden at a time when interest rates were in excess of 20%. The company's product line was outmoded. As only the third CEO in REI's 20 year history, my job was to turn things around quickly by cutting losses, jettisoning unprofitable products and returning the company to positive cash flow. The turnaround in REI's fortunes was remarkable. The company returned to profitable operations in October 1982 and proceeded to put together a string of 22 consecutive profitable quarters. The company's stock went from a low of $3.50 to $23.50. Record profits were recorded in both fiscal 1986 and 1987.

9. Because of my highly visible leadership style, I was accorded an inordinate measure of credit for the company's performance. REI's Board of Directors, facing a possible bankruptcy 18 months earlier, renewed and extended my employment contract in 1983 and paid me performance bonuses in excess of $400,000 in two consecutive years. They voted me numerous perquisites and promised others. The local and national media took note of what some referred to as the miracle at REI.

10. The May 21, 1984 edition of Forbes Magazine carried an article about Recognition Equipment entitled "Biscuits with Billy" (attached as Exhibit 1)

which included the following excerpt that accurately described my practice at REI:

> "Two years ago William G. Moore Jr., the new president of Recognition Equipment Inc. of Irving, Tex., began having breakfast several times a week with the company's blue-collar workers. The breakfasts quickly became known as 'biscuits with Billy.' The idea was to boost morale. Recognition, for nearly two decades the leader in machines that can read data through optical scanning, was on the verge of bankruptcy, burdened by overexpansion, poor marketing and careless financial control.
>
> These days Moore still drops in for breakfast, but the food tastes better. In the fiscal year ended Oct. 31 Recognition earned $9.6 million on $117 million in sales. In January it finished its seventh straight quarter of earnings gains with net of $1.1 million, more than double the year-earlier figure, on a 17% increase in sales. Backlogs stand at $46 million. At a recent $13 7/8 a share, up nearly fourfold in two years, Moore's stock and options are worth over $1.7 million.
>
> He earned it, too: Few turnarounds owe so much to a single executive."

11. In 1983, I was asked to be chairman of the Dallas Mayor's High Technology Task Force. In 1984, I was honored as Dallas/Ft. Worth Businessman of the Year. In 1985, I was elected Chairman of the American Electronics Association (AEA), the largest computer and electronics trade association in the world. In 1987, President Reagan appointed me to the Advisory Committee For Trade Negotiations (ACTN) made up of the

CEOs of some of America's most prestigious companies including IBM, 3-M, Boeing, etc. ACTN was chaired by James Robinson of American Express and interfaced directly with the United States Trade Representative Clayton Yeutter. I was invited and agreed to join numerous public interest boards, including the Boys Club of America, Boy Scouts of America, and the Public Broadcasting System (KERA-Channel 13) in Dallas.

12. In 1984, I was elected one of 25 Directors of the Dallas Chamber of Commerce with responsibility for promoting the technology portfolio for Dallas, including companies such as EDS, Texas Instruments and GTE. I participated in numerous foreign trade missions representing Dallas.

13. In 1986, I was honored along with football legend Roger Staubach as a recipient of the Shining Award for contributions I made to enhancing the positive public image of Dallas around the country and the world. During the Republican National Convention held in Dallas in 1984, I was chosen to give a nationally televised welcoming address to the 84 foreign ambassadors who had come to Dallas to observe the Convention. As a result of this and other community involvements, my name was mentioned as a serious, future political candidate.

14. In early 1985, the U.S. Attorney in Washington, D.C. and various agents of the U.S. Postal Inspection Service began an investigation of REI which almost four year later was to culminate in the indictment and trial of me, REI's vice president of marketing and REI on charges of conspiring to defraud the USPS in the procurement of automated mail sorting equipment.

15. REI made, among other things, equipment that could scan or read characters and process the information. This type of OCR scanning equipment was the kind that the USPS was interested in pursuing. This represented a very large potential market. I was concerned that REI seemed to be having little success with the USPS.

16. Shortly after my arrival at REI in March 1982, I asked for a meeting with then Postmaster General, Bill Bolger. This was to be the first of several such meetings, including social contact between Mr. & Mrs. Bolger and my wife and me over the ensuing years until Bolger's retirement. I told PMG Bolger that I couldn't understand, given its technology and the $50 million spent by the USPS on R&D conducted by REI, why the USPS hadn't ever awarded REI a production contract. I explained REI's financial predicament and that one of the options I had to consider was disbanding the company's substantial postal engineering group. Bolger said he thought that would be a mistake for both REI and the USPS and urged me to continue to pursue postal contracts. He said it would be a shame if the only United States developer of mail sorting technology were to abandon the market. I agreed with him.

17. At this time, the PMG's right-hand man in automation matters was James Jellison. Initially, Jellison echoed the PMG's encouragement for REI to stay the course. Throughout 1982 and 1983, I tried to repair the relationship between REI and USPS so as to position REI to win a major competitive procurement.

18. Using USPS research and development funds, REI had developed what was arguably the world's finest multi-line optical character reader (MLOCR). This multi-line technology offered a means for the

USPS to fully implement the proposed ZIP+4 without having to persuade large commercial mailers to convert their mailing lists to ZIP+4. Five REI multi-line machines had been successfully tested in "live mail" situations around the country. Given their superior performance characteristics, multi-lines were no more expensive than the less sophisticated single-line machines. And as an added inducement given PMG Bolger's self-proclaimed "Buy American" bias, REI's multi-line machines were designed and built in the United States whereas every single-line machine was of foreign design and would have to be manufactured under license by American companies.

19. Much to my surprise, PMG Bolger announced in late 1983 that there was no future for multi-line technology in the automation plans of USPS. It was reported to me by Robert Reedy, vice president of REI, that REI would not receive any USPS business.

20. At this point, the relationship between Mr. Bolger and myself took on an acrimonious caste. I candidly told PMG Bolger that I thought single-line was an unsound strategy, that I believed he had deceived me back in 1982 relative to REI prospects and that I intended to go directly to his Board of Governors and the U.S. Congress to try and stop the single-line ZIP+4 implementation. I could see that Bolger was upset with my criticism. Bolger repeatedly asked me to "back off" and promised that there would be an assessment by the independent Office of Technology Assessment (OTA) and that there would be studies by the General Accounting Office (GAO) which would vindicate his position. Jellison became even more strident and told me on several occasions that REI would never get any

multi-line production awards while he had anything to do with the USPS.

21. Eventually, I personally contacted members of Congress regarding the dispute with USPS, including Senator Russell Long and Representatives Richard Gephart, Martin Frost, Mickey Leland and Jack Brooks, and testified before Congressional committees regarding the single-line, multi-line controversy. As is seen in my June 30, 1983 correspondence with Senator Long and Representative Frost, attached hereto as Exhibit 2, I openly questioned why USPS would choose technology that was not only inferior but was also designed and manufactured outside of the United States. I continued to push for Congressional support of REI's OCRs from 1983 through 1986, including my work with Rep. Frost on a "Buy American" amendment to a USPS appropriations bill in 1985 that, if passed, would have enabled REI to secure a contract for MLOCRs. Bolger, Jellison and USPS management were aware of my sharp criticism and that I had taken the matter to Congress. Eventually, the USPS adopted the multi-line standard for ZIP+4 automated mail sorting.

22. In addition to my congressional lobbying activity, I spearheaded a media campaign at REI that openly questioned the USPS procurement policy of pursuing single line OCR technology. This media campaign continued between 1983-86, and I took every available opportunity to make REI's case public.

23. During 1985, REI entered into a consulting agreement with the consulting firm of Gnau and Associates, Inc. (GAI). This firm was first recommended to us by USPS Governor Peter Voss. We believed that this was a knowledgeable and reputable firm. Eventually

we learned that GAI's principals, Mr. Gnau and Mr. Spartin had been involved in an illegal kickback scheme with Peter Voss (the USPS Governor who had recommended them to us). I had no knowledge that GAI and its principals were engaged in this scheme when we hired them or while they were consulting for us.

24. In mid-December 1985, I learned that William Spartin had obtained a contract from the USPS to search for candidates to replace Paul Carlin as Postmaster General. Prior to this time, I had no knowledge that the BOG was considering replacing Carlin or that Carlin was going to be replaced as the PMG.

25. At some point during 1985, REI was contacted by agents of the USPS who said they were conducting an investigation regarding certain alleged irregularities in the procurement processes of the USPS. I made the determination that REI and I would fully cooperate in the investigation. The investigation continued and resulted in a grand jury investigation. USPS agents participated in assisting the U.S. Attorney's Office in conducting the grand jury investigation which resulted in an indictment being returned against me, REI and another REI employee in October 1988.

26. In July 1986, Robert Reedy, Frank Bray and I agreed to interviews conducted by Assistant U.S. Attorney Valder, and USPS inspectors Korman and Hartman at USPS Headquarters in Washington, D.C. We were told that we would be asked a few questions. Our lawyers said no special preparation was required and advised us to just answer all questions fully to the best of our recollection. The interviews would be brief and fair. Instead, I was grilled for more than three hours concerning, among other things, telephone call

message slips from 1984. As instructed, I answered every question to the best of my recollection.

27. During their investigation, neither the postal inspectors nor AUSA Valder ever questioned me about the meaning of any notes that I kept in my notebooks that were produced to the government as part of the grand jury subpoenas the were served on REI. For example, they never tried to find out from me what my notes concerning "consultant–wired (Peter Voss)" meant, nor did they ask what my notes meant concerning the discussions that I had with REI employees about the grand jury investigation and interviews that many of the employees would be participating in. I was similarly never asked to explain why various pages may have been missing from one of my notebooks.

28. The notation "consultant–wired (Peter Voss)" that is contained in my notebook that was turned over to the government during the investigation was my way of referring to the fact that Gnau was politically connected to Voss. It was my understanding that Gnau and Voss were political acquaintances and that Gnau was politically well-connected to the Reagan administration. My reference to Gnau being "wired" had no nefarious meaning or context and was a term of art that I had used—and that I had heard others use as well—on many occasions in referencing the political connection or relationship between individuals.

29. I never agreed with William Spartin, Peter Voss, John Gnau, Michael Marcus or anyone else at any time to cover-up or conceal any information from the Postal Inspectors or the government. Nor did I ever agree with anyone to destroy any documents at any time.

30. After the indictment, at the insistence of the Assistant Postmaster General for Procurement, I was put on leave of absence from REI, despite what I thought was my entitlement to the presumption of innocence. REI was forced to do this even before trial in order not to be financially crippled by a suspension from government contracting. USPS alternately insisted that my employment be terminated, that my legal fees not be paid by REI, that I not be able to profit from any appreciation in REI stock, that I lose all my CEO perquisites, etc. As a result of USPS pressure and an attempt to get REI's suspension lifted, the REI Board of Directors was forced to rescind my fiscal 1989 salary increase, reduce my fiscal 1988 bonus, eliminate my fiscal 1989 bonus participation, take away my company car, remove my privileges and disallow company paid telephone privileges. Worse yet, USPS insisted I have no contact with or participation in the management processes of REI. I was exiled from REI's headquarters campus and instructed to have no contact, professional or social, with those with whom I had worked so closely for eight years. The USPS took all of these actions directed at me before I had been proven guilty of anything. In the end, notwithstanding the efforts to placate USPS and despite acquiescing to all these demands and more, REI was still not allowed to bid on USPS automation contracts.

31. During the course of the government's investigation, my personal financial records and those of my wife were checked going back at least 18 years, and we were subjected to other surveillance activities, includeing a "mail cover" on mail delivered to my home address.

32. The indictment of REI was brought on October 6, 1988. I took a forced leave of absence from the company on October 20, 1988. The trial began on September 27, 1989. Federal Judge Revercomb dismissed all charges against me on November 20, 1989.

33. Largely as a result of the lengthy investigation and indictment, REI stock dropped from $22 to $5. I owned more than 100,000 shares. During the preparation for trial, The Prospect Group launched a hostile takeover attempt. Three weeks before the Judge's decision, there was a change of control at REI which never would have occurred had there not been an indictment. As a result, even though I was acquitted and REI was exonerated, I lost my job. In the three years prior to the indictment, my average compensation from REI was more than $1 million per year. The value of my stock ownership in REI declined from $2 million to $500,000. My stock options decreased in value by another $2 million.

34. Because of the indictment, I lost my job and leadership of the company I had rescued from the brink of bankruptcy six years earlier. Following my acquittal I started my own consulting business and, in December 1995, became Chief Executive Officer of USDATA Corporation, a publicly traded software firm in Richardson, Texas. In March 1997, I left USDATA and returned to my consulting business. None of the positions I have held since 1988 have been on the same "level" in terms of salary and perquisites as I enjoyed while I was with REI. Moreover, while prior to the return of the indictment I believed I would have eventually been a candidate for CEO positions with well known, large high technology companies having annual sales in excess of $1 billion, now, search firms do not contact me

for such positions because Boards of Directors almost uniformly reject a candidate who has been indicted.

35. The ordeal of investigation, indictment and trial has exacted a terrible physical toll on both me and my wife. Shortly after being notified of the impending investigation in late summer of 1988, I was treated at the emergency room at Parkland Hospital in Dallas for symptoms which included dizziness and disorientation combined with oral bleeding. This was subsequently diagnosed as an acute stress reaction. My wife suffered from chronic insomnia combined with temporomandibular joint disorder (often called TMJ).

36. I saw that USPS management was angry that I was openly critical of their procurement decisions and I saw that this hostility became more acute when I pressed the issue with Congress, including testifying to a Congressional subcommittee. When I dealt with USPS agents during the investigation, I observed and was shocked by their hostility.

37. My W-2 income from Recognition Equipment for the calendar years 1983 through 1988 is shown in the table below:

1983	1984	1985	1986	1987	1988
$204 K	$395 K	$673 K	$580 K	$2.3 M	$763 K

This compensation consisted of a number of elements including:

- base salary
- bonus equal 2% of pre-tax corporate profit
- company benefits (health insurance, life insurance, company matching savings plan, etc.)

- stock options
- perquisites (car, clubs, etc.)
- executive supplemental benefits

My stock options included the following specific grants:

DATE OF GRANT	# SHARES	PRICE	EXPIRATION
3/01/82	22,200	$4.50	3/01/92
3/01/82	127,800	$4.50	3/01/92
3/08/93	9,000	$10.50	3/08/93
4/27/84	7,000	$13.88	4/27/94
11/15/84	20,000	$11.79	11/15/94
5/23/85	10,000	$9.88	5/23/95
1/23/86	6,500	$14.63	1/23/96
7/23/86	20,000	$10.20	7/23/96

38. Since my arrival at REI on March 1, 1982, the value of REI's shares, and hence the value of options on those shares, had steadily increased.

39. The performance of REI shares was based primarily on two factors: (1) reported earnings on a quarter-by-quarter basis, and (2) outlook for the company's future growth as measured by the price earnings (PE) multiple investors were willing to assign to the company's stock. As can be seen from the Wall Street Journal article "Heard on the Street" (attached as Exhibit 3), investors were very bullish on REI's long term growth prospects with or without contract awards from the USPS. Had REI not been indicted and instead been allowed to participate in competitive procurement for multi-line mail sorters, the company would today be prosperous and its stock price would

reflect its traditionally high price/earnings multiple. Instead, REI suffered significant losses in its last two fiscal years ('90, '91) prior to going out of existence, having been acquired by a smaller company.

40. REI's chief competitor in the OCR procurement process for postal contracts during the mid to late 1980s was Electrocom Automation, who had teamed with a German company called AEG Telefunken to manufacture OCR equipment.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746(2), that the foregoing is true and correct. Executed in Dallas, Texas, on this *29* day of November, 2001.

/s/ WILLIAM G. MOORE, JR.
WILLIAM G. MOORE JR.

Forbes

Biscuits with Billy

Two years ago William G. Moore, Jr., the new president of Recognition Equipment Inc. of Irving, Tex., began having breakfast several times a week with the company's blue-collar workers. The breakfasts quickly became known as "biscuits with Billy." The idea was to boost morale. Recognition, for nearly two decades the leader in machines that can read data through optical scanning, was on the verge of bankruptcy, burdened by overexpansion, poor marketing and careless financial control.

These days Moore still drops in for breakfast, but the food tastes better. In the fiscal year ended Oct. 31 Recognition earned $9.6 million on $117 million sales. In January it finished its seventh straight quarter of earnings gains with net worth of $1.1 million, more than double the year-earlier figure, on a 17% increase in sales. Backlogs stand at $46 million. At a recent 13% a share, up nearly fourfold in two years, Moore's stock and options are worth over $1.7 million.

He earned it, too: Few turnarounds owe so much to a single executive. A cheerful Washingtonian, Moore, now 45, was recruited from Perkin-Elmer's minicomputer division in 1982 and charged with restoring Recognition. "I only took this job because I'm an incurable optimist," Moore quips. He needed to be, given the company's recent past. In 1964 Recognition's founders had patented one of the first optical character recognition (OCR) devices, which made electronics history by enabling machines to read and store data

directly from the printed page without a human keyboarder. Sales and earnings grew quickly as banks, airlines and oil companies lined up to buy Recognition's products to read checks, process tickets and sort documents. By 1969 the stock hit just over $100 a share.

But like so many electronics pioneers, Recognition failed to develop marketing and financial expertise to support its technical edge. Competitors such as IBM, and Burroughs, old hands in marketing and finance, began chipping away at Recognition's market. And, says Moore, Recognition's sales force had grown arrogant in its early success. By 1982 Recognition's share of the OCR equipment market had shrunk from a practical monopoly to one-third. While debt accounted for less than 25% of capital for most firms in the industry, more than half of Recognition's capital was borrowed. Worse, the debt mounted as the company borrowed $1.5 million a month to meet operating expenses. In his first days, Moore says, "People kept asking me when we were going to file for reorganization."

Instead of scuttling under cover for Chapter 11, Moore forced the company into shape. He eliminated marginal product lines, such as certain * * *

* * * * *

RECOGNITION EQUIPMENT INCORPORATED
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TELEPHONE 214-579-8900
TELEX 73-0653

CARPENTER FREEWAY
AT GRAUWYLER ROAD
IRVING, TEXAS

[SEAL OMITTED]

Recognition

William G. Moore
President

June 21, 1983

Senator Russell Long
Russell Building, SR 221
1st and C Streets, N.E.
Washington, DC 20510

Dear Senator Long:

I very much appreciated and enjoyed the opportunity to exchange some relaxed conversation with you over breakfast last Thursday morning. I also value your admonition to communicate more effectively on issues such as the USPS procurement foreign mail sorting equipment. And I promise to propose solutions, not just more problems!

As I mentioned during breakfast, I plan to become more active in the political process and hope to have the opportunity to see you from time to time and perhaps glean some counsel.

Again, I was pleased to meet you and feel free to call upon me should you need any help from a "transplanted Texan".

Respectfully,

/s/ BILL MOORE
BILL MOORE

bcc: Congressman Martin Frost
Neal Gregory

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[SEAL OMITTED]

Recognition

William G. Moore
President

June 22, 1983

Representative Martin Frost
Longworth Bulding, Room 1238
Washington, DC 20215

Dear Martin:

Last Thursday morning I was invited, along with nine other industry spokesmen, to have breakfast with the Senate Finance Committee. During the course of a "spirited" rap session concerning problems of international competitiveness in electronics, I had the opportunity to cite the example of REI's problem with the Postal Service.

Almost to a man, the rection of the Senators was surprise and dismay at foreign procurement of mail sorting gear. Russell Long was particularly animated on the issue saying in effect, "Why don't you boys tell us about things like this?" There were modest pledges of potential support from several other Senators.

In short, I'm becoming more convinced of the need to pursue this issue strongly. To that end, I'm drafting a fairly lengthly letter to you, recapping the situation,

and asking you to have the USPS "show cause" as to why they should not reevaluate its automaton plans based on the current technology available from REI. I hope have that letter in your hands by July 1st.

Look forward to seeing you on your return to Dallas over the July 4th weekend.

Regards,

/s/ BILL
BILL

bcc: Neal Gregory

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[SEAL OMITTED]

Recognition

William G. Moore
President

June 30, 1983

Representative Martin Frost
Longworth Bulding, Room 1238
Washington, DC 20215

Dear Martin:

Permit me to distill a great deal of detailed analysis and professional soul-searching into a few short pages. I'll conclude with some specific requests for your assistance. Throughout I have attempted to be scrupulously objective despite the natural bias I feel as chief executive officer of REI.

The United States Post Office (USPS) has embarked on an automation program using the ZIP + 4 scheme. REI strongly supports Zip + 4 coding. It furnishes an excellent technique to minimize the amount of time the individual letter carrier requires to sort and bundle mail prior to setting out on his/her route.

In fact, for the past 12 years REI has invested thousands of man hours of engineering talent and over $75

million in USPS research funding to perfect a full address reading OCR capability designed to automatically generate ZIP + 4. The machine you saw in operation recently at the Dallas Post Office ReadCodesSort-OCR (RCSOCR) is the culmination of that R & D effort. As you know, five (5) RCSOCR's have now been accepted by USPS and are fully operational in live mail sorting environments in Dallas, New York, Chicago (2) and Philadelphia.

Despite the unqualified success of full address reading with ZIP + 4 generation, the USPS has elected to procure equipment which reads only one line of the address (city, state and zip code). This type of equipment requires the mailing public to affix nine-digit zip codes in order to achieve the high return on investment (ROT) which the USPS has used in justifying it's $800 million automation program. In addition, the equipment now being procured is of foreign design. It is being manufactured in the United States by Burroughs and Pitney Bowes under license from Nippon Electric Company (Japan) and Elsag (Italy) respectively. At a time when our country's technological leadership is being assaulted by all forms of international competition, it's puzzling to me that the USPS would procure foreign designed equipment whose technology does not match that of a domestic supplier.

The RCSOCR system designed and manufactured by REI in Dallas, Texas appears to offer a superior solution to USPS automation needs for two major reasons. First, since RCSOCR can read a full address and generate ZIP + 4, there is no need to inconvenience the American public by requiring them to learn to use ZIP + 4. Moreover, projected ROI on postal automation is virtually assured since there is no dependence on the public's conversion to ZIP + 4. Secondly, the RCSOCR (albeit more expensive than single line readers) is more cost effective per mail piece since it sorts twice as fast as the single line readers and has a lower reject rate given its ability to read a full address and calculate ZIP + 4 even if no zip code (5 or 9 digit) appears on the envelope.

Summarizing, the USPS must automate to control labor costs and hold postal rates in check. Sophisticated OCR equipment is the key to successful automation using ZIP + 4. RCSOCR is the product of 12 years of effort and over $75 million of USPS R & D funding. It is arguably the best piece of mail sorting equipment in the world today. It is American designed and manufactured. For reasons known only to USPS, it has opted for a lesser technology which is not state of the art. That inferior technology will require a massive and costly conversion to ZIP + 4 by the U.S. mailing public. That conversion, based on experience with the 5-digit zip, will proceed slowly and the automation ROI forecasted by USPS will likely not be achieved thereby placing continued upward pressure on postal rates.

Martin, if you consider the logic of my argument reasonable, I'd like to enlist your support in surfacing this issue in the House of Representatives. More specifically, I'd like you to ask Representative Bill Ford

to request that the GAO accelerate its update of the Nine-Digit Zip Code Report (GAO/GGD-83-24), providing conclusive comparison of full address reading (RCSOCR) vs. the single line read approach. More specifically, GAO should assess the performance of the newly installed REI (American designed), Pitney Bowes (Italian designed) and Burroughs (Japanese designed) equipment against USPS equipment acceptance criteria. It is our belief as of this writing that REI is the only vendor of the three to meet or exceed all such acceptance criteria.

Further, I'd like you to encourage Representative Ford and Representative Mickey Leland to have the House Postal Committee visit the Chicago Post Office where all models of the current automation equipment are installed and operating. This will provide a first hand comparison of the technologies in question.

Finally, I would like you to consider sponsoring legislation to delay public implementation of ZIP + 4 until such time as GAO can update its report and the USPS has had an opportunity to review and fully assess the OCR technology now available and its impact on postal automation.

It's important to recognize that a number of other issues could surface should you elect to involve yourself in this situation. Among them are the privacy aspects of ZIP + 4, the USPS's unwitting transfer of optical character reading (OCR) technology leadership to foreign suppliers, USPS procurement practices in general, etc. That said, I've been most pleased by your willingness to dig into this situation. Your reputation on Capitol Hill as a conscientious, bright and extremely competent young congressman with no particular axe to grind is well suited to the objectivity with which this

issue must be approached. I look forward to working closely with you.

Regards,

Bill Moore

P.S. Attached is a brief recap of the performance characteristics of REI's RCSOCR which should assist you in framing a rather complex subject.

bcc: Neal Gregory
Bob Reedy
Is Sheinberg

THE WALL STREET JOURNAL

TUESDAY, SEPTEMBER 18, 1984

Recognition Equipment Is Making Strong Bid To Investors With Vigorous Growth Campaign

By RHONDA L. RUNDLE

Wall Street is showing signs it may be ready to let a classic high-tech underachiever out of the doghouse.

Recognition Equipment was a hot stock in the late 1960s. But in the past decade and a half, it has been in a nearly uninterrupted nosedive. The company flirted with disaster by failing to fulfill its promise to translate technological know-how into marketable products, mounting sales and robust earnings. Disappointed institutional investors gave up on the company, which developed a reputation as a "job shop" that engineered products it didn't know how to sell. That stigma could be starting to fade, however.

"For the first time in the 24-year history of Recognition Equipment . . . we have sales people running the company," chief executive officer William G. Moore Jr. told an investor conference hosted by Montgomery Securities in San Francisco last week. Mr. Moore also stressed the proprietary nature of the company's optical character-recognition technology, which enables it to make machines that read and store data, documents and other images. The machines are used for such tasks as currency sorting, check processing and credit card billings.

The company this year is reporting record orders and improving profit margins, and is considering some potential strategic business partnerships. After 2 1/2 years at the helm, management says it has completed a

financial turnaround and is set to concentrate, in the next few years, on achieving 15% to 20% annual revenue growth and 30% to 40% annual earnings growth.

Heard on the Street

In the nine months, ended July 31, operating income was $4.1 million, or 53 cents a share, compared with $1.6 million, or 25 cents a share, in the year-earlier period. Net for the latest nine months, which included a $1.3 million tax-loss carry-forward, was $5.4 million, or 70 cents a share, down from $7.8 million, or $1.22 a share. The year-earlier nine months included a $5.8 million gain on the sale of land and a $430,000 tax-loss carry-forward. Revenue climbed 16% to $99.2 million

Even before Mr. Moore's presentation ended, a few money-managers in the audience rushed out to phone orders for the stock. The next day, last Tuesday, Recognition Equipment climbed 1/2 and traded more than nine times its normal volume of about 18,000 shares. Trading was extremely heavy the remainder of the week but slowed yesterday in a liquid market. Recognition Equipment closed yesterday at 14 1/2, down 1/2, in New York Stock Exchange composite trading. Since late July, the stock has moved up more than 50%.

"I rarely go to a conference and buy stock, but this one really intrigued me," said one of the fast-acting money-managers who bought the stock. "I visited the company over a decade ago and had lost touch with it," he added. The manager, who asked not to be identified, says he's asked an analyst to study the stock and may increase his position.

"We picked up coverage about a month ago and said we would start monitoring the company," said Jon Gruber, a technology analyst at Montgomery Securities. "Because of this meeting, we're much more positive on the stock and it's one we would recommend." Recognition Equipment has an advantage over many other high-tech companies because it hasn't many competitors, Mr. Gruber said.

Mr. Gruber estimates that the company will earn $1.05 a share from operations in fiscal 1985, up from an estimated 76 cents in the current year, ending Oct. 31. Fiscal 1983 operations earned 48 cents a share.

Otis Bradley at Alex Brown says the company could earn $1.30 a share next year if and when one of several "wild cards" or "mega-events" materializes. The company has hinted that it is in talks that could lead to a supplier relationship with International Business Machines and possibly other major technology companies. And the company says it's "putting the finishing touches" on a joint-venture with Light Signatures to develop non-counterfeitable labels for various products.

Although the stock has had a nice rise in recent weeks, it still is selling below its 52-week high of 17 1/2. Mr. Gruber and others think it will continue to move up as more people hear the story.

"I think there's the potential for the stock to go a lot higher than it is now," says Mr. Bradley.

The money manager who bought the stock at the conference says this process could be accelerated if Recognition Equipment decides to offer more stock, as Mr. Moore suggested might happen if the price reaches the 16-to-18 range.

However, one institutional investor who bought the issue earlier this year and has been adding to the position this summer says he would hesitate to buy more at current prices. Small technology companies are risky, he emphasizes. Based on his $1.05 a share fiscal 1985 operating earnings estimate, the stock is selling at a 50% premium over the market's current price earnings multiple of roughly 10 times earnings.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 92cv2288

WILLIAM G. MOORE, JR., PLAINTIFF

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

No. 93cv0324

WILLIAM G. MOORE, JR., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DEPOSITION OF OF FRANK KORMANN

Washington, D.C.

Thursday, Feb. 17, 2000

Reported by:

ROBERT F. SAGER

* * * * *

[132]

A. I could guess.

Q. Give me a reasonable estimate, if you have one.

A. Ten to 15.

Q. And how about Mr. Spartin, how many hours did you interview him?

A. Mr. Spartin I would say maybe 40 hours.

Q. The primary issue in connection with REI, Mr. Moore and Mr. Reedy was whether, in fact, they knew about the kickback scheme that was going on between Voss, Gnau, Marcus and Spartin; isn't that right?

A. In terms of the conspiracy, yes.

Q. Knowledge was the key issue here, wasn't it?

A. Yes. There were other crimes that they were indicted for, but I think knowledge was key to most of those as well.

Q. When you interviewed Mr. Voss, he never told you that at he conveyed to Moore or Reedy, or anyone at REI, that there was a kickback scheme going on, did he?

[132]

A. I don't believe so.

Q. And Mr. Gnau never told you that he communicated to either Mr. Moore, or Mr. Reedy, or anyone else at REI, that there was a kickback scheme going on, did he?

A. There were some conversations between Mr. Gnau and Mr. Reedy that involved payments to Peter Voss, but I don't think, to my knowledge the word kickback isn't reflected in my notes.

Q. Isn't it true that Mr. Gnau when you interviewed him specifically told you that he never told Mr. Reedy about the payoffs that were being made?

A. My recollection is that he told him that he owed Peter Voss money, but that he did not say I have given Peter Voss $2500 in cash of the 10,000 that you have given me.

Q. In fact, do you recall that your notes that you took of your interview with Mr. Gnau specifically reflected that Mr. Gnau told you that he never told Mr. Reedy about the payoffs being made?

MR. MONTAGUE: Object to the form.

[134]

THE WITNESS: Well, my notes reflect what they reflect. I mean say—they are what they are. But my recollection is that John Gnau did not tell us that he had a discussion with Robert Reedy about payoffs and/or kickbacks to Peter Voss.

BY MR. KOCHER:

Q And he never told you that he had such a discussion with Bill Moore either, did he?

A. That's my recollection as well.

Q. Mr. Marcus never communicated to you that he told Bill Moore, Bob Reedy, or anyone else at REI about the payoffs that were being made, did he?

A. I believe that is correct.

Q. And Mr. Spartin never told you that he told Bill Moore, Bob Reedy, or anyone else at REI about the payoffs that were being made, correct?

A. The payoffs to Peter Voss?

Q. Correct?

A. I believe that's correct.

Q. In fact isn't it true that Mr. Spartin repeatedly said he never communicated that type of information to Bob Reedy, Bill Moore, or anyone else [135] at REI?

A. He said that on more than one occasion, correct.

Q. Were there discussions within the investigative team about the knowledge issue and whether Bill Moore actually knew about the payoffs that were being made?

A. There were discussions among the inspectors assigned, which would have been Hartman and myself at this point in the investigation, and the Assistant U.S. Attorney, who would have been Joseph Valder at this point in the investigation, concerning the evidence that we had gathered, and whether or not it pointed to knowledge on the part of William Moore.

And we had that discussion I'm certain more than once. And the result of the discussions were what I would describe as intensive research on the part of the U.S. Attorney's Office into the knowledge issue.

Q. What do you mean by intensive research?

A. I do recall a legal assistant, maybe two legal assistants working with staff at the U.S. [136] Attorney's Office to research what constitutes knowledge and what constitutes participation, et cetera.

Q. In fact, you had no direct evidence that Bill Moore knew about the payoffs; isn't that right?

A. Well, without defining words to everyone's understanding, it's fair to say that we did not have any one of the four co-conspirators, or five if you want to count Sharon Peterson, tell us that they had hold William Moore about the payoffs to Peter Voss.

Q. In fact no witness ever told you that, did they?

A. No witness told us that they had told William Moore about the payoffs to Peter Voss, that's correct.

Q. You understand the difference between direct and circumstantial evidence be don't you?

A. Yes.

Q. And is it fair to say that you had no direct evidence that Bill Moore was involved in the payoff scheme between Peter Voss, John Gnau, Michael Marcus and Bill Spartin?

[137]

A. Yes.

Q. The whole case was circumstantial, wasn't it?

A. The case involving William Moore or Robert Reedy or—

Q. The case involving Bill Moore.

A. Yes, I would agree with that.

Q. How many times did you interview Bill Moore in connection with your investigation?

A. Two or three times.

Q. Was one of those interviews done pursuant to a Kastigar agreement between Mr. Moore, Mr. Reedy and the United States Attorney's?

A. It was.

Q. What is your understanding of a Kastigar agreement?

A. At this point I cannot specifically recall the terms of the agreement or the letter.

Q. Generally speaking what is your understanding of what a Kastigar agreement is?

A. I do not recall at this point what that refers to.

* * * * *

[252]

Q. You understood back in 1987 and 1988, when you were doing these interviews of the REI board of directors, that REI and Bill Moore in particular had a right to go to Congress and engage in a congressional letter-writing campaign to try to get the Frost Amendment, or any other legislation passed in connection with the OCR equipment that REI was trying to sell to the Postal Service?

A. I would answer yes, that they had a right to petition Congress to do anything that they chose to petition Congress to do, within reason.

Q. Did you view the congressional letter-writing campaign as something that was improper by REI and Bill Moore?

A. I viewed the intended result to be improper.

Q. Why?

A. Because in fact the Postal Service was weighing the benefits of Recognition Equipment's equipment versus other competitors to determine which would best meet the needs of the organization, and Mr. Moore and Recognition Equipment were petitioning [253] Congress to basically require the Postal Service to buy their equipment.

And I would add to that that they were unsuccessful because—although I can't recall the specific words, they were unsuccessful because I believe it was one Congressman who recognized that this amendment would in fact require the Postal Service to buy equipment from Recognition Equipment, and that this perhaps was not what Congress' intent was in passing the proposed amendment.

So it did not pass.

Q. And that's why you believe it was improper for Bill Moore and REI to do this letter writing or this congressional campaign that they were doing?

A. To restate: I don't believe it was improper for them to petition Congress, whether through letter writing or a more general lobbying description to do anything.

However, the result that they were trying to obtain I believe was improper.

Q. During your investigation, Mr. Kormann, did you come to understand that Bil Moore and REI had a * * *

* * * * *

[583]

And one of the results of that, I think, was a communication from Bill Moore to Bob Reedy, you know, why are we dragging our feet on this issue, let's get this taken care of, let's get this underway, let's move on this.

Those are my words, but anyone would draw the same conclusion who reviewed those notes and communications.

Q. Do you have any explanation for me, Mr. Kormann, as to why the co-conspirators who either pled guilty or got an immunity from the government wouldn't be able to say—or wouldn't have told REI about the payments if in fact REI was part of the conspiracy?

MR. MONTAGUE: Object to form.

BY MR. KOCHER:

Q. In other words, we know from all the people you interviewed who are part of the conspiracy that not one of them said to you, I told REI payments were being made to Voss; we know that for a fact, correct? They never used those words, right?

A. That's correct.

* * * * *

[620]

Q. And do you recall that there were instances where Mr. Bray and his attorneys objected to language that you used and you would not let them change the statement?

A. We had some discussions, and again I cannot point to a specific issue at this time, but we had some discussions on words and phrases that not only were supported by our field notes, but at the time we specifically recalled Mr. Bray using those words in responding to our questions, or at some point during the interview. And in those cases we objected to a change of heart, let's say, on his part. We objected to him changing what he had stated the day before.

Q. I just want to make sure that we're clear about this. There were occasions, in your meeting with Mr. Bray and his lawyers, where he said I don't agree with the wording that you have used, the phraseology, if you will, I want to change it; and you as the Inspectors, you and Mr. Hartman, said, We're not letting you change that statement?

A. I can give you an example of how this interplay night have taken place.

[621]

Q. Sure, but can you answer my question first. That did occur, didn't it?

A. Not the way you described it. The interplay could have gone like this:

Mr. Bray takes an exception to a word, or phrase or sentence.

We would review our notes and say, Well, in fact this is what our notes say, and in fact don't you recall, Mr. Bray, that when we asked you that question, you did say those words.

And his response would be, Well, yes, I know I used those words and that was my answer, but I feel more comfortable saying it this way.

And so we would go back to him and reply, But those were the words you used; is that correct?

And says, Yes, those were the words I used, but I really would feel more comfortable if it read this way.

So in some cases we would make an amendment; but in other cases we would rely on the fact that those were the words that he used.

Q. Weren't there instances where they weren't [622] the words that Frank Bray used and you as the Inspectors insisted that the language remain the way you wanted it?

A. No, that's not true. There were times when the words that Mr. Bray wanted to use to amend the statement were not acceptable to us because they were in fact not his response during the interview.

And as you might expect his attorneys, strong advocates for Mr. Bray, objected to us not making the change based on what he was telling us at the moment.

And there had to have been at least one occasion, maybe two, where Mr. Valder was, if not brought in the room, at least consulted for his advice and guidance as to whether or not we would or should make the change.

And I cannot specifically recall if he came into the room and spoke to Mr. Bray's attorneys, but I do know that the result of all this was that a change or two that Mr. Bray wanted to make was not included in the statement.

Q. And if I understand what you're telling me [623] in terms of the reason you wouldn't let that change be made, is that you claimed on a prior occasion he had said something to you and the day that you were reviewing the statement he was saying something else?

A. The day before, not just on a prior occasion. It was the day before in the presence of his attorneys, during the interview that the statement summarizes.

Q. Weren't there occasions where his lawyer said, we were present, too, we didn't hear him say that? In other words, our notes reflects something different than what you're saying?

A. There were times when they stated that their notes reflected something different from what we were saying.

Q. Were there occasions, Mr. Kormann, where they stated, our notes and recollection differs from yours, we think it should be changed; and you said, No, we're not changing it?

A. It's difficult to recall exact words that his attorneys may have said or that I may have said. But the bottom line is that they did propose changes [624] to his statement that we did not agree to because they were different from the actual words that Mr. Bray had stated in response to the questions during the interview.

Q. To your recollection and to your notes? Based on dour recollection and notes, correct?

A. Correct.

Q. And in some of those occasions, Mr. Bray and his attorneys' recollection and notes reflected something different; correct?

A. That would have been what they stated at the time.

Q. And in some of those instances you said, We're not changing it, we're leaving the statement the way we think you told it to us based on our recollection and our notes?

A. In some instances, that's the result of our discussion, yes.

Q. Mr. Bray's lawyers were Ellen Huvelle and Chris Kearney, is that correct?

A. Yes, that's correct.

Q. From the law firm of Williams & Connolly
* * *

* * * * *

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So I would have no reason as an investigator looking at the full mosaic of evidence and activity in the case to conclude that they would suddenly mike a complete disclosure of everything to Mr. Bray. And in fact there's indication that they did not.

Q. You were selective in the information that you put into Mr. Bray's statement, weren't you?

A. I was selective in the sense that we had 50 pages of field notes, roughly 50 pages of field notes, and four days of interviews, and untold hours that were reduced to 22 pages of summary.

Q. And one of the things that Mr. Bray and his lawyers specifically told you during the interviews that they wanted included in that statement was what is reflected in page 9 of your notes, that to Bray's knowledge he saw no indication that Moore or Reedy knew of the money to Peter Voss; isn't that right?

A. They wanted us to include such a statement in his summary report.

Q. And you refused to do that, right?

A. It's not in there, that's correct.

ROBBINS: Testing for polygraph examination at Washington, D.C. on December 5, 1986, testing, testing, for polygraph examination, December 5 at Washington, D.C. December 5, 1986. I'm gonna tape record everything we do here today and you have had several polygraph tests, I understand, over the past five or six months.

SPARTIN: That is correct. I've had three.

ROBBINS: Three tests. When was the last test you had?

SPARTIN: Last week

ROBBINS: Did you take that over in Virginia?

SPARTIN: Yes sir, I did.

ROBBINS: How long did it take to do that?

SPARTIN: Oh, I guess from the time we started until I left about an hour.

ROBBINS: Your first name is William?

SPARTIN: William, yes sir.

ROBBINS: You have a middle name?

SPARTIN: Yes I do, Anthony.

ROBBINS: S-P-A-R-T-I-N? Where were you born?

SPARTIN: Chicago.

ROBBINS: When?

SPARTIN: October 5, 1929, makes me 57.

ROBBINS: Where do you live?

SPARTIN: I live at 10801 Stanmore, S-t-a-n-m-o-r-e Drive, Potomac, MD.

ROBBINS: How long you lived there?

SPARTIN: Since '75, 10-11 years.

ROBBINS: Who lives there with you?

SPARTIN: My wife and various children from time to time. We have four children. They have been in and out.

ROBBINS: And what's your wife's name?

SPARTIN: Cleo, C-l-e-o.

* * * * *

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SPARTIN: No, I did not overhear it.

ROBBINS: Did you or anyone at REI know that Peter Voss was getting paid as part of that thing?

SPARTIN: To my knowledge, no sir.

ROBBINS: You never discussed it with them?

SPARTIN: I did not discuss it with them.

ROBBINS: Were you ever present when anyone talked to them about Voss about getting any money?

SPARTIN: No sir.

ROBBINS: Was Peter Voss at any meetings with REI?

SPARTIN: He was never at any of our meetings with REI. No sir. Now I read in the documents that he had visited REI on different occasions. He suggested that REI hire John Gnau. But, I, what confuses me is that everybody is beating me up on this issue and I don't know what people want. I tell them but if they would talk to my attorney and tell my attorney, my attorney could tell me, then I could tell you what answers they want. I don't know.

ROBBINS: Well, what they want is they want to find out what you did and what you were told and you told others. That's all, you know just a simple matter of truth, you know what happened.

SPARTIN: But they got to ask a specific question then I could, you know.

ROBBINS: Sure I know, well.

SPARTIN: To my knowledge, REI did not know anything about bribing Peter

Voss nor did he know about the agreement in terms that Peter Voss was part of it.

ROBBINS: You didn't tell them.

SPARTIN: I did not tell them, no sir.

ROBBINS: You were never present when REI People discussed such a thing?

SPARTIN: No sir. I was not.

ROBBINS: You never overheard anyone tell anyone from REI . . .

SPARTIN: No sir.

ROBBINS: . . . that Voss getting money from John Gnau?

SPARTIN: No sir.

* * * * *

[22]

* * * my wife crazy by saying have Bill call me, I want him to do this and that. I need him. Umteen times he would drive my wife nuts to the point she says you're fucking crazy to get involved with this shit she said. And I told my wife everything by the way. My wife knew this whole bloody story right from the beginning, and I'll continue on about John McKean. John asked

me what about Paul Carlin, and I said I've been reading the newspapers. The letters come out about Paul Carlin, the newsletters. Morale is slipping at the agency. You had Jackie Strange over there digging Paul Carlin all the time. She had her own little campaign to get rid of Paul Carlin. I think Peter Voss put her up to that and I told John when John asked me what do you think about our Paul Carlin. I think Paul is a very nervous person. I told him I was reading all these articles and I said Jackie Strange is telling me he has lost control of the post office. So I told the Inspectors this that I had a conversation with John McKean, that I told him what I had heard. At that point it's when I suggested that they give him a chance to, I said you got to confront the man with his problems. I said you just can't do anything about it. You don't fire Postmasters of the United States. So they said okay Bill, we'll follow your advice and I don't know what happened. I understand they did sit down and give him some sort of performance appraisal. I never saw it and I never asked because, you know, it's not my business, and I kept trying to get John Gnau to back off and

back off all during the month of October. Every time I said to John, I said John, drop it. I said Jesus don't push this thing. I said let nature take its course. John said no, goddamn I want to get my money. So, I never had a conversation with McKean other than basically that. Now no one believes me. The Inspectors don't believe me. They think that John McKean, and I'll tell you something, John McKean is an ass hole. Sorry. And I have no love for John McKean and I'm not protecting John McKean. I could care less about John McKean. I don't care about John McKean. I'm looking about William A. Spartin, so why am I gonna protect John McKean.

ROBBINS: I agree with you. I don't blame you.

SPARTIN: Jesus, you know, and I don't give a hoot and hell about Bill Moore.

ROBBINS: Did you talk to Bill Moore about this? Did you get Casey's name from Bill Moore?

SPARTIN: I did, yes sir.

ROBBINS: What was the situation there? What happened there? Why, did you have any discussion with him

about Casey and why he would recommend Casey?

SPARTIN: I'll tell you how it happened and basically everybody's testimony supports this except John Gnau lied in his testimony to the grand jury. I started this assignment sometime around, I don't * * *

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* * * president of the Electronic Manufacturers Association and to get him to introduce me to companies in this country and outside of this country would have been the biggest coup in the world for me, you know, here's the president of REI calls up and say hey, Fred, I want you to meet Bill Spartin one of the top recruiters, I can get into see Fred who's chairman of the board or president of the company. I could have ended up with a million dollars worth of business out of that just by introduction that he could have given me. Now, I made notes because I was prepared to sit down and, I called Pierce and I said Pierce, I'm ready to talk about the 12, let's have a meeting and my notes are all prepared, and

they never called me back. I gave those notes to my attorney.

ROBBINS: You made those notes after the investigation started?

SPARTIN: After the investigation started, yes sir.

ROBBINS: You didn't make them at the time of the meeting or shortly after the meeting?

SPARTIN: No sir.

ROBBINS: Do you have any knowledge about whether anyone in REI knew Peter Voss was involved in this scheme to get them the sole source contract? Or was being paid?

SPARTIN: Let me answer you this way. Being paid, no sir, I don't. I have no knowledge of that at all. Peter Voss being part of the deal, no knowledge. But, you know I read that goddam testimony and I'm not a lawyer but Jesus, there's enough there to seem to me to hang REI from the yardarm. REI, Voss told REI to use Gnau and I didn't read this anywhere. John Gnau told me that and I told that to the Inspectors. They wanted to meet me before they did anything with John, so they came to Washington

sometime early on, I don't remember the dates, February, March, somewhere, it's in some calendar somewhere and Moore and Reedy sat across my desk and said to me, before we do business with you, or with your firm, we want to get to know you because John has praised you to the high heaven. I said well, you know, Peter Voss is a friend of mine, okay? I didn't say we were working together. I didn't say, I didn't know at that time that Peter Voss was, had signed legal documents and so forth with John, I mean I never saw those documents to this day. Then, it was a funny thing is that one day they were in town to do something, to go up to the Hill and I happened to be in town that day and I went over to say hello to them. As I was standing in the lobby of this building downstairs, who walks up but John McKean and the REI people are about 15 feet away and John comes up to me and John and I have a brief conversation and we shake hands and he, you know, was telling jokes and geez it couldn't have happened, you know, more precipitously and after that they just assumed that I knew John McKean very well also, and I got, Gnau said geez that's the best that ever

happened to us was to have McKean walk in at that time.

* * * * *

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ROBBINS: About this case, about this particular matter of the REI contract?

SPARTIN: No sir? I'm not.

ROBBINS: You have been forthcoming with all the information you got on that, and I'm not talking about some simple little detail or date or, you know, something like that? I'm talking about major facts that you have been questioned about and that you would be deliberately lying about on this polygraph test?

SPARTIN: No sir.

ROBBINS: Alright. (LONG PAUSE) Okay one of the questions I want to ask you, Bill, were you present when anyone in REI was told that Gnau was paying Voss to help REI get the post office contract and what was your answer to that question?

SPARTIN: Was I present? No.

ROBBINS: Do you have any knowledge that anyone in REI was told that?

SPARTIN: I only have my suspicions. I think between you and I and this wall that John Gnau was very close to Bob Reedy and John has a tendency to talk. John's a talker, can't keep a secret if his life depended on it. My gut tells me that John and Reedy are a lost closer than people think. So to answer that question, read it again to me.

ROBBINS: Okay, my question is, were you present when anyone in REI was told that Gnau was paying Voss to help REI get a post office contract?

SPARTIN: No.

ROBBINS: But your feeling is that John Gnau probably did.

SPARTIN: Yeah, I have a suspicion that there's more than meets the eye, that's what I'm trying to tell you.

ROBBINS: John Gnau, did he ever tell you that he told anybody at REI?

SPARTIN: John never shared, if you can believe this, here we were sort of friends, business friends, he never told me anything he was basically doing. John never told me about it. All John would say, he's handling REI. You know I wish I had been. I wish I could give them REI. Be-

cause I really think that they pulled a lot of cute tricks and they're sneaky people and I'll be damned if I can do it, and I'm not gonna lie.

ROBBINS: No. Well nobody wants you to lie about it, I mean that's not what we are here for, is it? We want to hear the integral facts of the case and if anybody in REI knew or if we can't prove it, then so be it. That's the way it is. We don't want any kind of a government action based on any false information or any false accusation or * * *

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ROBBINS: I know. Are you nervous about this test?

SPARTIN: It's just I'm more nervous about this one than anyone I ever had before. My heart is in my mouth, my mouth is dry, my heart is going blip. You probably see it over there. This is very nerve racking.

ROBBINS: Well, you're doing fine. Don't worry about anything.

SPARTIN: It's so bad I want to help, I just don't know how, that's the problem.

ROBBINS: Well, you can't help anything on this test. Just sit quietly and answer the questions.

SPARTIN: I don't mean just this test, I mean this whole mess. If I just could be more helpful.

ROBBINS: If you knew something on REI, you'd tell us.

SPARTIN: Boy, would I tell you, I got nothing to lose. It's stupid not to tell. Even John McKean, that man, has probably cut more side deals than anybody, but I can't make up a story.

ROBBINS: No, it wouldn't stand up you know. The Inspectors just don't take one person's word for something and act on that. They corroborate it.

SPARTIN: It's been nerve racking for me because my windows have been broken and I've gotten a lot of nuisance phone calls.

ROBBINS: Really? I haven't even thought about that part of it.

SPARTIN: I know these guys are not friends of mine, and I was warned by my attorney who said if you do this they aren't going to be nice to you. Boy they have been vicious.

ROBBINS: Well, it's a matter of survival. They may not survive if you give certain information.

SPARTIN: I've given what I had. My personal concern, I'll have to live with this. I didn't have the guts to do what I should have a long time ago.

ROBBINS: How's your arm feel?

SPARTIN: Anytime you're ready, sir.

ROBBINS: Don't want to be too hard on you here now, so any problems, you just let me know, alright? You sit still now, let's start the test. Were you born in Chicago?

SPARTIN: Yes.

U.S. POSTAL SERVICE ROUTING SLIP	DEPT., OFFICE OR ROOM NO.	☐ APPROVAL ☐ SIGNATURE ☐ COMMENT ☐ SEE ME ☐ AS REQUESTED ☐ INFORMATION ☐ READ AND RETURN ☐ NECESSARY ACTION ☐ INVESTIGATE ☐ RECOMMENDATION ☐ PREPARE REPLY
TO: 1		
2		
3		
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5		
FROM: DATE		EXTENSION ROOM NO.

REMARKS:

[HANDWRITTEN]

Zschau is running for Senator
so it looks like they are
trying to throw a little
dirt on him via REI.

Dave–
I hope we can get
this data on all "supporters"
on the hill both for the
investigation and for Bob's
report.

[ILLEGIBLE]

ITEM 0-13 (Additional Remarks on Reverse) U.S.O.P.O: 1984 334-2

Aug. 1976 (Formally Form 18)

Zschau sought postal work for firm now probed

By Deri Meimert

WASHINGTON - Rep. Ed Zschau, R-Los Altos, intervened twice in the past two years on behalf of a Dallas firm seeking a lucrative U.S. Postal Service contract that is currently the subject of three federal investigations.

Zschau, the Republican Senate nominee, wrote two letters in an effort to assist Recognition Equipment Inc. of Dallas in competing for a contract, which could be worth up to $500 million, to supply mail sorting equipment.

A federal grand jury here, the General Accounting Office, and the postal service are investigating the contract competition which was suspended in Jane.

The probes began came after Peter Voss, former vice chairman of the postal service governing board, pleaded guilty May 30 to federal charges of receiving illegal payment or kickbacks in connection with the Dallas company's lobbying efforts for the contract.

Zschau's Senate campaign committee received $4,500 in contributions from Recognition Equipment Inc.'s political action committee and current and former company officials in the past two years, Federal Election Commission records show.

Zschau, who denied any impropriety, told reporters yesterday he sent letters to the postal service urging officials to acquire the type of mail reading equipment developed by Recognition Equipment because he knew the company's president.

He said be wasn't trying to exert pressure on the postal service to choose the company over another.

"I really don't have any influence," Zschau said. "I did not represent the merits (of the equipment). I'm not in a position to make a technical judgment."

Zschau said he has made the same effort for companies in his Silicon Valley congressional district.

From December 1984 to December 1985, Recognition Equipment President William G. Moore was chairman of the American Electronics Association, a position held by Zschau in 1978. The association's chairman typically works closely with Zschau, who has played a prominent role on high technology issues since elected to the House in 1982.

The contract competition stemmed from a 1978 postal service decision to improve its automated letter sorting abilities by changing the ZIP code system from five digits to nine. Recognition Equipment, with more than $60 million in postal service funds, has been developing a multiline address reader that can scan a letter's address and assign a nine-digit code if one is not there.

Another Texas-based firm, Electrocom Automation, developed a single-line reader, that required the use of the nine-digit code, using technology licensed to a West German firm. The single-line readers were cheaper and in 1984 that company received a $194 million postal service contract.

In an April 2 letter to Postmaster Albert Casey, Zschau expressed an "ongoing interest" in the automation program for the postal service. He urged the postal service to "move ahead quickly" to acquire multiline address readers, since the expected wide-spread cor-

porate use of the nine-digit ZIP codes never materialized.

"I strongly oppose the U.S. Postal Service funding the development of competitive technology by foreign vendors, and I was deeply concerned to learn that such development contracts have been let," Zschau wrote in the April letter.

He also wrote a similar letter in 1984 to members of the governing board. Neither letter mentioned Recognition Equipment by name, but clearly described the technology it uses.

The company's political action committee contributed $2,000 in 1985 and $1,000 in 1986 to Zschau's Senate campaign. Moore contributed $580 in 1985.

Reid Dennis of Woodside, a member of the company's board of directors until 1983, has contributed $3,000 to Zschau's campaign since 1984.

"I don't think Ed knew they were giving a dime," Zschau aide Jim LeMunyon said. "I was the one drafting the letters and I didn't know about it.

"People are contributing to Ed Zschau because they think he is the kind of person who would make a good senator. . . ." LeMunyon said.

Recognition Equipment's PAC, established in June 1982, distributed $21,500 to political candidates in 1983 and 1984, an election year. The PAC contributed almost $18,000 in contributions so far this year.

Voss, a Reagan administration appointee to the board who co-chaired Reagan's Ohio campaign in the 1980 presidential race, pleaded guilty to taking at least $20,000 worth of payoffs in a fee-splitting arrangement with a public relation firms hired by Recognition Equipment.

August 11, 1986 FEDERAL TIMES Page 15

Congressman Tried to Swing Contract to American Firm

By J.P. Mackley

SAN FRANCISCO — A member of Congress tried to persuade the U.S. Postal Service on how to issue a muti-million dollar contract two months before former Governor Peter E. Voss pleaded guilty in a federal court to charges of taking bribes in return for attempting to influence the same contract.

Rep. Ed Zschau, R-Calif., a former electronics company executive who is currently running for the Senate, wrote a letter to Postmaster General Albert V. Casey April 2. Federal Times obtained a copy of the letter under the Freedom of Information Act.

"Although I fully appreciate the desirability of having multiple vendors to provide a competitive environment, I strongly oppose the U.S. Postal Service funding the development of competitive technology by foreign contractors," Zschau wrote.

Zschau asked Casey to "move ahead quickly" in adopting new optical character reading sorting technology, which is capable of reading four lines of address and printing a corresponding bar code on the front of an envelope."

Zschau said he was "anxious to do all I can to encourage its [the automation program] speedy implementation using existing American technology that can do the job today."

Only one firm in the running for what could amount to a half-billion dollar contract uses U.S. technology to manufacture the optical character readers. That firm is Recognition Equipment Inc., of Dallas. The other competing firm, Electrocom, also of Dallas, uses technology licensed by Telefunken West Germany.

Zschau's letter to Casey did not specifically mention REI. But Zschau's press

There were a number of fluctuations in the trading of the stock which coincide with Board of Governors meetings.

secretary Jim Lemunyon, told *Federal Times* July 21 that Zschau wrote the letter on behalf of REI. He said Zschau had been a friend of REI chief executive Bill Moore since 1979. At that time Zschau was president of the American Eletronics Association, a position now held by Moore.

Voss also used the "buy American" theme in his repeated attempts to persuade the board of governors to issue a contract to REI, according to court testimony.

Voss pleaded guilty May 30 to accepting $20,000 to $25,000 in return for attempting to steer the contract to REI. According to federal prosecutors, Voss conspired with John R. Gnau Jr. and William A. Spartin, principals is a public relations firm hired by REI at Voss' recommendation, to divide a 1 percent commission on the total contract amount.

REI's political action committee and Moore have contributed to Zschau's campaigns, according to Federal Election Commission records. Reid W. Dennis, a Woodside, Calif., businessman who was on the board

of REI through early 1983, and his wife also have made maximum contributions of $1,000 to Zschau campaigns. Dennis' most recent contribution was in June.

According to Zschau's press secretary, however, "Ed doesn't know Reid Dennis."

Dennis is a well-known contributor to Republican candidates and chairman of the board of Collagen Corp., one of the largest firms in Zschau's district.

[IMAGE OMITTED]
Rep. Ed Zschau

Dennis also is a member of the board of directors of GRiD Systems Inc., a computer manufacturer in Zschau's district which was awarded a $4.4 million contract May 1 to supply the postal service with microcomputers.

The Postal Inspection Service is currently investigating the GRiD Systems-contract as part of its study into postal procurement practices sparked by the Voss guilty plea.

Thomas W. Weisel, a partner in Montgomery Securities, of San Francisco, gave Zschau the maximum contribution in 1984.

According to Jon Gruber of Montgomery, a California brokerage house, the firm traded a major part of the REI stock sold during the period when Voss was trying to influence the equipment procurement contact. As disclosed ealier in *Federal Times*, there were a number of fluctuations in the trading of the stock which coincide with Board of Governors meetings when decisions critical to the REI contract were made.

There is no indication of any wrongdoing on the part of Montgomery Securities.

Postal Inspectors and the Securities and Exchange Commission are currently investigating whether there was insider trading involved in the Voss affair. Another congressman, Rep. Martin Frost, D-Texas, pushed a bill through the House Rules Committee last summer that would have required the postal service to enter into a $200 million contract with REI and eliminate Electrocom from the competition to supply the sorting equipment.

The bill was sidetracked by Rep. William D. Ford, Mich., chairman of the House Post Office and Civil Service Committee. Ford said at the time that the bill would have "put a gun to the head of the Postmaster General."

The PMG at the time was Paul N. Carlin, who was actively opposing Voss and Governor Ruth N. Peters in their attempt to give REI the contract. Carlin is now suing the board of postal governors, charging that he was illegally fired because he opposed Voss' illegal scheme.

John Williams, a freelance writer from Berkeley Calif., contributed to this report.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 92cv2288

WILLIAM G. MOORE, JR., PLAINTIFF

v.

JOSEPH B. VALDER, ET AL., DEFENDANTS

No. 93cv0324

WILLIAM G. MOORE, JR., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DEPOSITION OF OF JOSEPH B. VALDER

Washington, D.C.

Tuesday, Feb. 29, 2000

Reported by:

ROBERT F. SAGER

* * * * *

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* * * with Mr. Bray and his counsel, to make sure that it accurately set forth the facts of the investigation to Mr. Bray's knowledge.

Q. His counsel was Ellen Huvelle, now Judge Huvelle?

A. Yes, and Mr. Kearney Christopher, I think.

Q. You made reference, I think, to an interview of Mr. Spartin where you tore up his immunity letter, or his nonpros letter; do you remember?

A. A copy of it, yes, sir.

Q. That was a preplanned session, wasn't it?

A. Yes, it was. Preplanned with my supervisors and the agents. Inspectors.

Q. Am I correct that Mr. Spartan and his attorney were asked to come to a meeting with you and various Postal Service Inspectors on the day in question?

A. Yep.

Q. And why did you want to meet with Mr. Spartin?

[337]

A. Because Mr. Spartin was in exceedingly great error as determined by objective fact in many of his recollections. The Inspectors and I did not

understand why he could not recall certain things where it was obvious that he was present and there and should have had some recollections, about two events in particular, although there were many more smaller things involved.

Q. Did you ever instruct Postal Service Inspectors—

A. You know, I don't think I finished the answer to my question.

There was this great mystery to us why he couldn't recall many things, two major ones in particular, and we needed to get to the bottom of it, to pursue the truth and obtain the truth for the grand jury, and make sure Mr. Spartin was complying with his nonpros agreement. So we scheduled this meeting.

Q. Did you ever have a circumstance where you instructed postal Inspectors to make someone say [338] something?

A. Not that I recall. By that description, no.

Q. Did you intend to intimidate or threaten Mr. Spartin on the day in question?

A. I guess it's a matter of definition.

If you had asked me at that time what my intent was, my intent was to get his attention, that he was not telling us the truth.

Q. You admit he was threatened that day?

A. You can use that word. I wouldn't particularly use that word.

I would say that I made a direct, blunt, candid approach to his mind to wake him up that he was not telling the truth.

Q. Were you aware at that time that he had been under the care of a psychiatrist?

A. I don't know whether I was aware at that moment. And at some point I became aware of that. Okay.

Q. Were you aware—

A. But I don't know that I was aware of it at [339] that time. And I would guess that I wasn't, because we really hadn't gotten very far with Mr. Spartin in a full recounting of his knowledge and circumstances at that time.

Q. Were you aware that he was under the care of a cardiologist or a heart doctor?

A. I don't think I was at, that time.

Q. Were you the one that planned what would go on at the session where a copy of his letter was torn up?

I guess my question is, whose idea was this?

A. I don't think it was the Inspectors. I remember that the Inspectors and I met with Mr. Block and Mr. Spivack—let me start this way.

I considered it my problem. The Inspectors were my investigators. They were, you know, pouring work into this. They had interviewed Spartin a number of times. They had gotten the REI records. They had bees through them.

You know, I don't know, I'm going to guess there was, you know, thousands of pages of REI [340] records. Gathering records from lots of places, trying to put together the reality of what had happened.

And I started hearing from the Inspectors that Spartin just isn't telling the truth. And they don't understand why.

The Inspectors I was learning at that time, only to learn better later, were absolutely A-plus Quality inspectors, diligent, bright, intelligent, high integrity, excellent, wonderful investigators. And they couldn't tell me why Spartin was having these problems. It was a major puzzle to us.

And so I talked to my supervisors about the situation, trying to get their ideas, suggestions, input, et cetera. And this then led to my saying to Block and Spivack, whether it was both of them or one of them, I don't remember for sure, that I suggested why didn't I have the Inspectors come in so the four or five of us could sit down and discuss the matter.

And so they said, sure, that was a good idea. And so the Inspectors came in and you know we [341] had—there later was a document dated November 13—I think that document was in

existence in the days, the week or two leading up to October 24 or 28, I can't remember which the date of the Spartin meeting was. But I think that document was in existence at that time.

And we discussed with my supervisors this amazing conflict that Spartin could not remember being at a meting at REI in Dallas in August of 1985, and that he could not remember being at a dinner celebration on January 9 of 1986, at the Madison Hotel here in Washington., D.C., with Moore, Reedy, Bray, Spartin and Gnau. That he could not remember being at these two meetings.

And so the Inspectors and I met with my supervisors—Oh, and I should add, when other people at those events, and notes of people at those events, including notes of REI employees and officers, showed Spartin being there. And recounting things Spartin had said at those meetings.

And so it's sort of like the thing I talked about this morning with the bank robbery where, you [342] know, you're the bank robber. We knew he had been there. It was absolutely clear, beyond any doubt whatsoever, objective fact, that Spartin was at these two meetings, but Spartin did not remember. At least he was not saying that he remembered. We were not getting from Spartin that he had been at these meetings, and I think he was denying being at the meetings.

Q. Well, let me just interrupt?

A. Excuse me, no.

Q. I think you've gone beyond the question. And I will let you finish the answer, but to be sure we all understand this, because this is going to be important when it goes to the jury.

Are you saying he denied he was at those meetings, or he had told the Inspectors he didn't recall?

A. No, he denied being at them. And so this was the puzzle.

And the Inspectors, you know, didn't have the particular feeling that he was lying, you know, that he was remembering being at them, but he was [343] saying, well, I wasn't there. I was not being told that they thought he was just stonewall lying.

But they couldn't understand why he couldn't remember being at these two meetings.

And so I talked to my supervisors. And I think—and this goes way back to the question I was trying to answer a little while ago. I think it may have been one of my supervisors' suggestion, you know. It was a consensus—you know maybe it's my suggestion.

You know, there was a consensus we had to do something very significant. We had to, as I said, my intent was we had to wake him up. you know, there's an image I have in my mind of, you know, shocking someone to get their attention.

And that's what we were trying to do. And with my supervisors' concurrence. Whosever idea it was. That I would tear up a copy of the plea agree-

ment, and tell him that because he clearly wasn't telling the truth, he was in danger of losing the benefit of his plea agreement. Or of his nonpros agreement.

* * * * *

[344]

And that was approved by my supervisors.

Q. Well, with all due respect, I move to strike that to the extent it's not responsive.

My question was: Whose idea was it?

A. And I have said I don't think it was the Inspectors' idea. It was one of the three prosecutors present in the discussion.

And if you told me I had to pick the person out of whose mouth that came, I would say it was mine. But it might have been Mr. Block or Mr. Spivack.

Q. It was Block, Spivack, or you?

A. Yeah, I think it was. And I think probably it was me.

Q. At the time when there was this immunity or nonpros agreement with Spartin, is it fair to say that what that meant is if he cooperated in good faith and gave you truthful testimony, to the limits of his recollections, that he would not be prosecuted?

A. Yes, that's what it says. And that's what happened.

[345]

Q. All right. Now, as a practical matter, if a witness who is the subject of one of those agreements doesn't cooperate, or lies to you, you can revoke the agreement; right?

A. Yeah. That's my understanding. And the agreement probably says that right in it.

Q. That was one of the options you had going into that meeting; right?

A. I believe so.

Q. Who else was present at the meeting where the copy of the letter was torn up?

A. I remember—you know, it's a large table. It's not as big or fancy as this table. It's probably two-thirds the size. Okay. And say the door is the position that the door is in your room here.

I remember sitting roughly where you're sitting at the table.

I remember Mr. Spartin and Mr. Gettings sitting on the opposite side of the table, roughly where Ms. McCarthy is.

I remember to my right, Frank Kormann and [346] Mike Hartman were seated to my right.

I have a recollection Dave Smith was there, but that's fuzzy.

And I don't have a particular recollection of anybody else being there, but there could have been somebody on the other side of Hartman and Kormann, on my right.

Q. Mr. Edwards was there, wasn't he?

A. I don't remember him being there. If he was there, I wouldn't disagree with it. If he says he was there, I wouldn't disagree with it.

Q. Anybody else?

A. That's all I recall.

Q. So it's Spartin and Gettings, and—

A. Hartman and Kormann, me, maybe Dave Smith.

Q. Okay. And by my recollection Mr. Edwards said he was there, testified to?

A. If he said that, then I wouldn't disagree with it.

Q. Did you arrange to have Postal Inspectors present?

A. It has been a religious point of my [347] procedures in working with witnesses as an Assistant U.S. Attorney that I never ever meet with a witness without agents present.

So I am sure that I wanted at least one agent present, since to the best of my recollection Hartman and Kormann were sort of the co-case

Inspectors, that I probably would have wanted both of them present.

And I don't remember who said what as to why Inspector Smith, if he was there, was there, or Inspector Edwards was there, if he was there.

Q. Do you remember discussion about asking for multiple agents to be there as a show of force, or something to that effect?

A. I don't remember those comments. If someone else remembers them, I wouldn't disagree with them.

Q. You didn't need that many agents—

A. You know, I would quibble with one word. Not show of force. Show of importance.

Q. You didn't need to have, assuming I'm right that there were four other agents there, you didn't [348] need to have all them there in order to deliver your message that Mr. Spartin was in danger of losing his nonpros agreement, was he?

A. No, I'm not sure that's right either. Because I think what we did that afternoon is we sort of gave him a catalog of the points on which it was our opinion he was not telling the truth, and I would have wanted probably any inspector who was at an interview where he said X or Y or Z, or who had studied the notes of Paula Ezernack, E Z E R N A C K, an REI employee sitting at the meeting at REI in Dallas in August of 1985 saying, you know, Spartin was there and Spartin said XYZ.

I think I probably would have wanted the people there who could explain to Mr. Gettings and Mr. Spartin that he wasn't telling the truth. Or I at least want them there to listen to whatever explanations were forthcoming from Spartin and Gettings, if any. If all those people were there. I might well have wanted them there for reasons such as I just described.

Q. Were the four or five of you trying to [349] intimidate Mr. Spartin?

A. The four or five of us were trying to wake Mr. Spartin up that he wasn't telling the truth and he needed to tell us the truth.

Q. How long did the meeting last?

A. My diary might answer that. My recollection, without refreshing my recollection from my diaries, is probably something in the range of an hour, hour and a half, two hours.

Q. You raised your voice at various points during the meeting, didn't you?

A. Probably above a conversational tone, just like my voice is a little raised right now.

Q. Is it fair to say you shouted at Mr. Spartin?

A. I don't think I shouted at Mr. Spartin, nor do I think I'm shouting now. It would be the same energized use of the English language to directly and effectively communicate to the listener my—the content of my words.

Q. Well, would it be fair to say that someone watching you that day said you raised your voice, [350] appeared angry, and then quickly ripped up the letter?

A. I think I probably raised my voice. If someone perceived my external manifestation as being angry, I probably wouldn't disagree with their perception of it. And that I ripped up the nonpros—a copy of the nonpros agreement. I did all those things.

And you should also understand, part of the planned approach with my supervisors was that I would tear up a copy of it. Not the original, because that document is sort of sacred to Mr. Spartin's rights, and to the government's interest. And that the copy that I tore up, that I would save for use at trial.

Because all of this was something that we knew would be subject to cross-examine at the trial, we wanted to preserve everything that happened, so one day defense counsel could do whatever they're paid to do on behalf of their clients.

As is always the case with refreshing recollection, that if you do that kind of thing you need to make sure you preserve it, so you can [351] accurately present it to a court later on.

Q. What did you do with the pieces of the copy of the letter after you tore it up?

A. I'm quite certain that I stapled them together and they were—I remember for sure they were an admitted exhibit.

Q. No, immediately after you tore it up?

A. I don't know.

Q. Did you throw them up in the air?

A. If we can pretend for a second, let's say, that I tear them up (indicating)—no, I don't think I threw them up in the air. I think I would have laid them on the table. Or held them in my hands for a while while I talked.

Q. Did you or any of the agents stand up at any time during the meeting, when you were trying to wake Mr. Spartin up, to use your words?

A. I don't remember particularly but it would not surprise me if I was standing when I tore it up. I think I would have had it in my hands, and as I was talking, to emphasize the point to Mr. Spartin and [352] Mr. Lettings, I think I probably stood and was in some sort of a position where my posterior was no longer in direct contact with a chair.

I don't recall being fully standing. I think I was probably in a rising kind of motion.

Q. Did you tell the Inspectors not to take notes of that meeting?

A. I might have.

Q. Had you ever, in any other circumstances in the REI investigation, told Inspectors not to take notes of a meeting?

A. I would guess I probably did as I've done in other cases.

Q. The meeting was not recorded, was it?

A. Nope. Not to my recollection it wasn't. Better not have been.

Q. Did you want to give Mr. Spartin the impression—you didn't tell him that it was a copy of the letter you were tearing up, did you?

A. I don't remember.

Q. Did you want him to think that you were revoking his agreement?

[353]

A. I could—My sort of reasoned recollection is that I would not have told him it was a copy. That I probably wanted him to think it was the original. Again, to wake him up.

Q. Do you consider the use of deception appropriate methods for an employee of the Department of Justice in the United States Attorney's Office to be appropriate?

A. Deception such as—if that's a word you want to use for this situation, I consider what I did in this situation to be absolutely appropriate. The law recognizes the use of ruses by investigative

agents, police, in questioning prospective defendants, defendants, witnesses, whoever.

I would guess the same law applies to what I did.

Q. Does the law authorize the use of ruses and deception by attorneys who are part of the United States Department of Justice, as opposed to police?

MR. MONTAGUE: Object to forms.

THE WITNESS: To my knowledge, the law authorizes it; as my supervisors approved it.

[354]

BY MR. POHL:

Q. Did you tell your supervisors that you were going to have four agents in attendance, that you were going to stand and raise your voice?

A. I would think that my supervisors knew that I was going to have the agents necessary, call it four, present. Because I have a rather firm recollection about the thing that I wanted whoever was present that would be useful in conveying to Mr. Spartin the situation he was in to answering questions, whatever.

What was the other part of your question.

(The record was read as requested.)

THE WITNESS: I remember—I have answered the part about the four agents. I remember discussing with my supervisors the fact that I

was going to do my best to get Spartin's attention as to the situation—Mr. Spartin's attention as to the situation he was in.

I don't recall that I discussed with them the concept of standing, or that I discussed the concept with them of raising my voice, although I'm * * *

* * * * *

[479]

Q. Were you trying at any time in this grand jury, trying to control the flow of information?

A. I was trying my absolute level best to make sure that proper evidence was presented to the grand jury.

Q. And that involved you and the Inspectors determining from time to time what you thought was the truth?

A. No. It involved the Inspectors and I deciding yeah, I would say that. What was the truth. We would not want non-truthful evidence presented to the grand jury. It's the heart of the whole Spartin refreshing his recollection situation, that we wanted to satisfy ourselves that the investigation was identifying truthful testimony and authentic documents to be presented to the grand jury.

Q. Now, you understood that the witness had a right to have counsel?

A. Sure, absolutely.

Q. And Mr. Bray chose to have Ellen Huvelle with him, and Mr. Kearney?

[480]

A. I don't know who chose.

Q. In any event, it was a situation where the witness had counsel and you were having to work with both of them?

A. That's correct.

Q. Okay. When you left at approximately 6 p.m. on the night of the 14th or 15th, whatever night it was where they worked late—

A. Right.

Q. —what instructions did you give Hartman and Kormann?

A. I probably didn't give them any instructions. They knew that our objective was to complete a truthful statement by Mr. Bray containing relevant information for the grand jury, relevant and competent and material information for the grand jury.

And I think I excused myself as quietly as I could, and apologized for not being able to be present that evening, and I left.

Q. Did you, or in your presence Inspectors Hartman and Kormann, give Mr. Bray and his attorney [481] the impression that this statement would be read to the grand jury as Mr. Bray's testimony?

A. I probably did.

Q. And when the negotiations—

A. The final agreed-upon statement.

Q. And you understood that there were passages that the Inspectors had originally drafted that Mr. Bray thought were misleading and he wanted removed?

A. I wouldn't use the word misleading. I would say—

Q. Or—

A. You know, I would say if you look at Deposition Exhibit 7, the draft—the typed draft in use on July 5th, there are many changes that Mr. Bray wanted that were made.

I don' t know misleading would be the right word. I would say accuracy would be the right word.

Q. Okay. There were some changes, you later found out, that Mr. Bray wanted made that Hartman and Kormann wouldn't make; is that right?

A. I think I later found out there were [482] changes that his attorney wanted made.

Q. Well, the attorney speaks for the witness in those circumstances; they're allowed to communicate with the government through an attorney, isn't a witness allowed to do that?

A. I think so. But—

Q. Did you resent that?

A. Of course not. But the fact that Ms. Huvelle is saying something, doesn't mean Mr. Bray wants it. And I think that it is unfair to attribute what Ms. Huvelle wants to be what Mr. Bray wants.

Q. At no time did Mr. Bray ever say, repudiate that whatever Ms. Huvelle was asking for?

A. No, not at all. Not to my knowledge.

Q. And there were some things that Mr. Bray, speaking for himself or through counsel, wanted inserted in his statement that Mr. Hartman and Kormann refused to put in, isn't that true?

A. I don't know exactly whose—you know, there is no knowledge, there is no information I have to say that if you're looking at the last paragraph [483] on Deposition Exhibit 7, that when Ms. Huvelle says that Frank Bray wanted that included in his statement, I don't know whether it's her conclusion or whether it's Mr. Bray's conclusion. I think it's sort of like the royal we.

Q. Well, if you're saying that she wanted something in that wasn't his testimony, are you accusing her of misconduct?

A. No, I am saying that when I came to work on the morning of July 16, 1987, as indicated in the margin, the Inspectors wanted to discuss with me and Ms. Huvelle the contents of the last paragraph.

That they wanted it in, and that the Inspectors had some difficulty and they didn't think

it was appropriate to have in because of, you know, whatever reasons they had. And I don't remember what they were at this time.

Q Well, it says, "Discuss with AUSA Valder," right?

A. Yes, it does.

Q. Whose handwriting do you think that is?

A. It's not real small and tiny, like most of [484] the other handwriting on the document. Which makes me a little reluctant to say, but I would guess it's Kormann's.

Q. You believe it's one of the two Inspectors?

A. Oh, for sure.

Q. Right. It doesn't say discuss with AUSA Valder and Huvelle, does it?

A. No, it doesn't.

Q. And you understand that that was a paragraph that Mr. Bray and Ms. Huvelle wanted included that Hartman and Kormann wouldn't include?

A. I understood at the time it was a paragraph Ms. Huvelle wanted included, and the Inspectors didn't.

Q. Okay.

A. Because of changes that they wanted as to where it had been from the day before.

Q. And when you left that negotiating session, if you will, the night before, had you given Hartman and Kormann authority to make agreements for you with regard to what would be in the statement and what wouldn't?

[485]

A. Of course not.

Q. Weren't they conducting themselves as if they had the authority to make decisions about what would be in the statement and what wouldn't be subject to agreement—

A. No, my understanding is they were conducting themselves as saying that they wanted to talk to me about it, because they had problems with having some of the changes in as to what it would mean, whether it was fully truthful, or whatever.

Q. When you came in in the morning, was it Hartman or Kormann that told you about the events throughout the night?

A. I think both of them were there.

Q. And did they tell you that they had reached agreement on a number of things with respect to what would be in Bray's statement and what wouldn't be?

A. I think that they told me, if you would compare FWB—excuse me, Deposition Exhibit 7 to Deposition Exhibit 6, I think they had told me that they had made a lot of progress, that they ate

Chinese food, that they worked late, and that all of [486] the changers that had reflected in the discussions the day before had been made.

They then appeared in what is the typewritten portions of FWB 15, Deposition Exhibit 6, and that there was a problem as to the last paragraph in what had been in now deposition 7. That Ms. Huvelle wanted the paragraph in as annotated by Frank Kormann, and that they had some problems with it being in, I don't remember exactly what those were, but I think it had something to do with accuracy. And that they recommended it not be included.

Q. Who is—Hartman and Kormann?

A. The Inspectors. And so we discussed it with Ms. Huvelle. Whatever their disagreements were, I think were out on the table.

It seemed to me to be one of those situations where we were not going to make progress by that time from July 14th and 15th, there were other issues that had percolated. And I think in the early morning hours of the 16th they had a number of those things written out in handwriting.

[487]

And I, to move past the problem, I asked Mr. Bray, Ms. Huvelle and Mr. Kearney, if they would agree that we take the statement—the paragraph out, they could give me their list of handwritten recommendations for what I would cover in the grand jury, and that I would ask in my discre-

tion those points that I thought were appropriate in the grand jury. And they said yes.

And Mr. Bray's trial testimony under oath agreed that that's what happened.

Q. Were there eight points on the list that you were going to ask about?

A. My recollection is there were eight points.

Q. But you didn't ask about all eight though, did you?

A. Either the point was already before the grand jury through other witnesses, and I re-emphasize my point to you that it's the prosecutor who determines what will be presented, it's not the witness. And there's case authority for that.

So if the information was already before the grand jury, you'll see reference in there [488] Mr. Bray had a plane to catch at ten after five on a Friday night, there was a time crunch to get him out of there so he could make his plane. And if there was evidence to argue before the grand jury on a point, I wasn't going to take the time to do it. And I think the actual reality is that all of the information was either before the grand jury through other witnesses, or Mr. Bray got to address it before the grand jury.

Q. Is it fair to say that you were aware from your observations that day that Ms. Huvelle and Mr. Bray believed they had an agreement with you that as to the points, those eight points, and as to specifically the last paragraph of Exhibit 7, that

those would not be in the statement that would be read, but that you would ask Mr. Bray questions designed to cover those points?

MR. MONTAGUE: Object to form.

THE WITNESS: Yeah, evidently you're not listening to my testimony.

The agreement was that I would ask such of those point as I in my discretion deemed appropriate [489] before the grand jury. And they agreed with that.

BY MR. POHL:

Q. Did you specifically say to Mr. Bray and Ms. Huvelle that you might not ask questions on all those points?

A. I think the phrase that I in my discretion would deem it as those questions I deemed appropriate, that that would convey that I might not ask them all.

Q. Do you remember using the term in my discretion?

A. Absolutely.

Q. You didn't cover all 8 points in questioning Mr. Bray, did you?

A. You know, I think not. If I had a copy of the list of eight questions, I could be a little more articulate on this point. But I think early on there's something about other clients, and I don't know that

it was Ford Aerospace, but it was some other business or something they had.

And, you know, there was a point there that GAI had done a good job and that they were good [490] consultants kind of thing.

And I saw in some grand jury transcripts last week characterizations of Mike Marcus as being gifted, and talented, and a great consultant.

And so the best of my recollection can do for you right now, counsel, is to say that I may not have asked all eight of them of Mr. Bray, but by the time the grand jury's evidence was completed, that all eight of those points were before the grand jury.

Q. Not from Mr. Bray?

A. And I should add—

Q. Not from Mr. Bray's testimony, though, right?

A. Perhaps not all of them.

And it should be clear that this thing in the last paragraph in Deposition Exhibit 7, that Mr. Bray stated that he was shocked by Voss' plea, and Moore and Reedy expressed surprise at Voss' plea, that was clearly in Bray's testimony.

Oh, and I should say, too.

Q. What's—

A. I remember one of those points.

UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: POSSIBLE VIOLATIONS OF
18 U.S.C. 201, 371, 1341:

Grand Jury Room No. 2
U.S. District Courthouse
3rd & Constitution, N.W.
Washington, D.C. 20001

Tuesday, Sept. 1, 1987

The testimony of WILLIAM A. SPARTIN was taken in the presence of a full quorum of Grand Jury No. 87-1, impaneled on October 7, 1986, commencing at 1:15 p.m., before:

JOSEPH B. VALDER
Assistant United States Attorney

* * * * *

[10]

A Yes, sir.

Q Is this information stated in this summary document true and accurate to the best of your knowledge and belief?

A Yes, sir.

Q I'm going to ask you some other questions, Mr. Spartin, and you've probably heard these many times in the last few weeks and months.

In the month of August 1987, have you had occasion to be at the office of the postal inspectors in the headquarters building for the purpose of reviewing some documents?

A Yes, sir.

Q While there, did you have conversations with them of some nature?

A Yes, sir.

Q Do you recall a conversation with them in which they asked you whether in your judgment Moore and Reedy knew that Voss was receiving money from Gnau on the MLOCR contract or the MLOCR procurement?

A Yes, sir.

Q Do you recall that you told them that in your judgement Moore and Reedy did know that Voss was receiving money from Gnau relative to the MLOCR procurement?

A That is my opinion, yes, sir.

Q And I would like to ask you, sir, what do you base [11] that on? Why do you have that recollection and that understanding? Who did what, said what? What factual events do you base that on?

A Well, my feeling is that with the many conversations between Mr. Reedy and myself and the many conversations between Reedy and Mr. Gnau, and my conversations with Gnau and Voss, that it became—at least in my opinion, I felt that Mr. Reedy knew that we were somehow taking care of Mr. Voss, because I rationalize that why would Mr. Voss be so adamant to help us and all the things he was doing, which we relayed back to Mr. Reedy, just led me to believe that they had to come to the conclusion that somehow we were doing something to take care of Mr. Voss. And that's where I came to the conclusion that, in my opinion, that they had to know way down deep if they asked themselves or looked at the issue, that we were—GAI was handling Mr. Voss.

There was many conversations or many nuances; there were many telephone calls. REI could very well say why is Mr. Voss so strong to get this contact through, what's in it for him, and I just felt all along that they had to know that something was going on.

Q When you say there were "conversations and nuances," what do you remember? What kind of conversations, what nuances? Does anything come to mind?

A You're talking specifically now.

United States District
Washington DISTRICT OF Columbia

TO: **Custodian of Records**
REI Political Action Committee [PAC]
Post Office Box 222307
Dallas, Texas 75222

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

IN RE: POSSIBLE VIOLATIONS OF
18 U.S.C. Section 201, 371, 1341

SUBPOENA FOR:
☐ PERSON ☒ DOCUMENT OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	Room
United States District Court For the District of Columbia 3rd St. & Constitution Avenue, N.W. Washington, D.C. 20001	DATE AND TIME TUESDAY, August 5, 1985 at 1:30

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

DUCES TECUM (Bring With You/Furnish): SEE ATTACHMENT

[NOTE: Mailing the records called for to the attorney whose name and address appears below by the date called for will be considered satisfactory compliance.]

☐Please see additional information on reverse

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK	DATE
James F. Davey, Clerk	July 24, 1986
(BY) DEPUTY CLERK [Signature Illegible]	

This subpoena is issued upon application of the United States of America /s/JBV	NAME ADDRESS AND PHONE NUMBER OF ASSISTANT TO U.S. ATTORNEY JOSEPH B. VALDER, AUSA 272-9019 Special Prosecutions Section U.S. Attorney's Office, 5th FL 555 4th Street, N.W. Washington, D.C. 20001

"If not applicable, enter "none"" To be used in lieu of AO110 FORM OBD-227

86-8023 NF #10

ATTACHMENT
REI POLITICAL ACTION COMMITTEE [PAC]

For the period July 1, 1983 to the present:

1. Cash receipts and disbursements journals and any and all other documents which reflect the receipt and disbursement of PAC funds to include the contributors' and payees' name.
2. Monthly statements, deposit tickets with copies of items deposited attached, cancelled checks and check stubs for any and all REI Political Action Committee bank accounts to include, but not be limited to, account numbered 0097101226 at Mercentile National Bank at Dallas.
3. REI Political Action Committee Bylaws; a list of current and prior officers and trustees; and notes, minutes and transcripts of any and all meetings.
4. A summary of all contributions to candidates and or holders of public office.
5. Any and all documents that reflect authorization for individual PAC disbursements.

RETURN OF SERVICE

RECEIVED BY SERVER	DATE July 24, 1986	PLACE U.S. Attorney's Office
SERVED	DATE August 4, 1986	PLACE Dallas, TX via Certified Mail
SERVED ON (NAME) Marshall M. Searcy, Counsel for REI		
SERVED BY U.S. Mail		TITLE

STATEMENT OF SERVICE FEES

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on 8/6/86
Date

/s/ M.C. HARTMAN
Signature of Server

M.C Hartman, Postal Inspector
Special Investigations Division
475 L'Enfant Plaza West, [illegible]
Washington, D.C. 20260-2112
Address of Server

ADDITIONAL INFORMATION

(1) As to who may serve a subpoena and the manner on its service see Rule 17(d), Federal Rules of Criminal Procedure or Rule 45(c), Federal Rules of Civil Procedure.
(2) "Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure Rule 17(d), Federal Rules of Criminal Procedure or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure)"

[SEAL]

U.S. Department of Justice
United States Attorney
District of Columbia

Judiciary Center Operations
555 Fourth St. N.W.
Washington, D.C. 20001

Feb. 9, 1987

Marshall M. Searcy, Esquire
4200 Republic Bank Tower
Dallas, Texas 75201

Dear Mr. Searcy:

Please find enclosed a new subpoena. Please call Mike Hartman upon receipt of the subpoena to make arrangements for turning over the material at your earliest convenience. Thank you.

Sincerely yours,

JOSEPH E. DIGENOVA
UNITED STATES ATTORNEY

By: /s/ JOSEPH B. VALDER
JOSEPH B. VALDER
ASSISTANT UNITED STATES ATTORNEY

United States District Court
Washington DISTRICT OF Columbia

TO: **Custodian of Records**
[Recognition Equipment Incorporated]
2701 N. Grauwyler Road
Irving, Texas 75061222

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

IN RE: POSSIBLE VIOLATIONS OF
18 U.S.C. §§ 201, 371, 1341

SUBPOENA FOR:
☐PERSON ☒DOCUMENTS OR OBJECTS(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date , and time specified below.

PLACE	Room
United States District Court For the District of Columbia United States Courthouse 3rd St. & Constitution Avenue, N.W. Washington, D.C. 20001	Grand Jury Room #2 Third Floor
	DATE AND TIME THURSDAY, March 5, 1987 at 10:00 p.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

DUCES TECUM (Please Furnish/ Bring With You): SEE ATTACHMENT

COMPLIANCE MAY BE SATISFIED BY DELIVERING THE REQUESTED INFORMATION TO POSTAL INSPECTOR MICHAEL HARTMAN

☐Please see additional information on reverse

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK	DATE
James F. Davey	February 9, 1987
(BY) DEPUTY CLERK [Signature Illegible]	
This subpoena is issued upon application of the United States of America	NAME ADDRESS AND PHONE NUMBER OF ASSISTANT TO U.S. ATTORNEY JOSEPH B. VALDER /s/JBV Assistant United States Attorney U.S. Atty's Ofc., Spec. Prosecutions Judiciary Center Building 555 Fourth Street, N.W. Washington, D.C. 20001 (202) 272-9019

"If not applicable, enter "none."

To be used in lieu of AO 110

FORM OBD-227

86-8023 NF #10

435

ATTACHMENT

RECOGNITION EQUIPMENT INCORPORATION

1. Any and all original notebooks, diaries, notes, memoranda and reports prepared or maintained by REI employee Paula Ezernack which reference; a) the content of staff meetings held by William Moore, Robert Reedy or Frank Bray or b) conversations, meetings and transcriptions involving Robert Reedy and Gnau & Associates, Inc. (GAI).

2. Any and all original records and documents (notes, memoranda, reports and correspondence) which reflect services performed by Gnau & Associates, Inc. pursuant to a September 26, 1985 Agreement for Corporate Consultant, Purchase Order No. 72253, to include but not be limited to:

a. articles placed with trade publications and reporters in Washington, D.C. or elsewhere;

b. records reflecting the arrangement of interviews with journalists and reporters;

c. records reflecting meetings with United States Congressmen;

d. records reflecting the arrangement of receptions for REI executives in the Washington, D.C. area or elsewhere;

e. records which reflect consulting services or meetings with or regarding the REI Political Action Committee;

f. Records reflecting GAI's assistance or actions relative to applications for export licenses of REI equipment through the Department of Commerce;

g. copies of all applications for export licenses of REI equipment prepared or submitted through the Department of Commerce during the period January 1, 1985 through June 30, 1986;

h. Any and all documents reflecting expenses incurred by GAI pursuant to this agreement to include but not be limited to invoices, receipts and checks;

3. Any and all original notebooks, diaries, notes, memoranda, reports, video tapes or correspondence prepared by or for REI officers and directors relative to the proposed (pre-agreement and post-agreement) and actual services performed by Gnau and Associates, Inc. pursuant to all consulting agreements to include but not be limited to records and documents reflecting:

a. a September 1984 meeting between Robert Reedy and Peter Voss;

b. an October 1984 meeting between Robert Reedy and John Gnau;

c. December 1984 telephone conversations between William Moore and Peter Voss;

d. a Janaury 1985 meeting attended by William Moore, Israel Sheinberg, Thomas Loose, Robert Reedy and representatives of the GAI;

e. January 1985 visits to the Gnau and Associates office by REI employees and officers;

f. a June 1985 meeting among REI officers and GAI representatives at the REI offices;

g. July 1985 meetings among REI officers, Gnau and Associtates, Inc., and Terry Miller;

h. August 28 and 29, 1985 meetings among REI officers and representatives of Gnau and Associates, Inc.;

i. December 1985 telephone cnoversations among William Moore, Robert Reedy and William Spartin;

j. a January 9, 1986 meeting attended by William Moore, Robert Reedy, Frank Bray, John Gnau and William Spartin;

k. March 1986 telephone conversations between William Moore, Robert Reedy and William Spartin;

l. post March 1986 telephone conversations between and among William Moore, Robert Reedy, Frank Bray, John Gnau relative to an official investigation;

m. source and background documentation relative to the suspension or termination of purchase orders numbered 65449 and 72253;

n. original and rough drafts of REI's report to its directors relative to the conduct of its officers and consultants relative to the

current Federal Grand Jury investigations into REI's attempts to obtain Postal Service OCR business.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-91CV2491-G

WILLIAM G. MOORE, JR. AND
BLANCHE K. MOORE, PLAINTIFFS

v.

JOSEPH B. VALDER, MICHAEL HARTMAN, FRANK KORMANN, ROBERT EDWARDS, PIERCE MCINTOSH, DANIEL HARRINGTON, (FIRST NAME UNKNOWN) ROBBINS, AND OTHERS AS OF YET UNKNOWN, HEREBY DESIGNATED AS JOE DOE DEFENDANTS 1-25, DEFENDANTS

STATE OF FLORIDA
COUNTY OF INDIAN RIVER

AFFIDAVIT OF WILLIAM C. HITTINGER

Before me, the undersigned authority, personally appeared William C. Hittinger, who being first duly sworn according to law, deposes and states as follows:

1. My name is William Hittinger. I reside at 149 Bellevue Avenue, Summit, NJ 07901.

2. I serve on the Board of Directors of Recognition Equipment, Inc. ("REI") and have done so for more than ten years. I hold a Bachelors Degree from Lehigh University, from which I have also received an honorary doctorate. I am presently the Chairman of the

Board of Trustees at Lehigh and have served on that Board since 1972. I am also a member of the Board of Directors of Bethlehem Steel Corporation, UNC Corporation, Thomas and Betts Corporation and The Stabler Companies. I have served on numerous other civil and charitable organizations and committees, including the National Security Telecommunications Advisory Council, a commission which reported to the President of the United States, and I was appointed to serve on the Presidential Commission on United States-Brazil Technology.

3. Following my graduation from Lehigh University and service in the U.S. Army during World War II, I was employed by Western Electric and National Union Radio Corporation before joining Bell Laboratories in 1954. I was eventually promoted to the position of Executive Director of Semiconductor and Electric Tube Division, and from 1966 to 1968 I was President of Bellcomm, Inc., a subsidiary of AT&T. In that capacity, I worked on the Apollo Space Program. From 1968 to 1970, I was President of General Instrument Corporation. From 1970 to 1986, I was employed by RCA, from which I retired as an Executive Vice President in 1986.

4. I first met William G. ("Bill") Moore, Jr., in about 1981 when, in my capacity as a Director of REI, I interviewed him as part of REI's search for a new president. He was subsequently hired by REI as Chief Executive Officer and President and eventually was elected Chairmen of the Board of Directors as well.

5. In late 1987 to 1988, I was asked to testify before a grand jury in Washington, D.C. in connection with what I understood to be an investigation of REI and the activities of Bill Moore and others. I was not accompanied by counsel when I appeared to testify.

6. The day of my testimony, as I recall, I had lunch with Assistant U.S. Attorney Joseph Valder and two men whom I understood to be postal inspectors assisting Mr. Valder in the investigation. That conversation was memorable to me because at one point, Mr. Valder stated in substance that the merits of the case or whether the persons involved were guilty or not did not concern him. He explained that it was important to him that he win the case because he wanted to get a track record or some notoriety which would help him obtain a good position in private practice. He explained that his career objectives went beyond the Department of Justice and that the REI case meant a lot to him and his career. The substance of his conversation was that he wanted to get a conviction in that matter because he thought it would help him land a lucrative position in corporate law.

I was shocked and infuriated that he seemed not to be interested in fairly assessing the merits of the case but saw the investigative proceeding as his opportunity to get a significant "win" for his career advancement. This was inconsistent with my understanding of how a federal prosecutor was supposed to act, and it upset me greatly. I later reported the conversation to company counsel.

7. When I testified before the grand jury, I felt that I was berated by Mr. Valder with respect to how the Board of Directors of REI and I, as Chairman of its Compensation Committee, construed a financial compensation package for Bill Moore. Mr. Valder seemed to want to make it appear to the grand jury that there was something improper about the compensation being paid to Mr. Moore. This seemed to me to be not fairly related to what I understood were the matters under

investigation, and I recall that his approach troubled me as being unfair. I did my best to explain how carefully we had worked to evaluate comparable compensation packages for executives in other companies and how executive compensation generally is established.

I have read the foregoing affidavit, and I swear that the facts contained therein are true and correct to the best of my personal knowledge, information and belief.

/s/ WILLIAM C. HITTINGER
WILLIAM C. HITTINGER
NJ DR H 47197856311224

SWORN TO AND SUBSCRIBED
before me this 28th day
of March, 1992.

/s/ AUDREY J. [ILLEGIBLE]
Notary Public

My Commission expires:

Notary Public State of Florida
My Commission Exp. Nov. 8, [ILLEGIBLE]
Bonded thru [ILLEGIBLE]

[SEAL]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ No. 92-2288
Civ No. 93-0324

WILLIAM G. MOORE, JR., ET AL., PLAINTIFF

v.

JOSEPH B. VALDER, ET AL., DEFENDANT

VIDEO DEPOSITION UPON ORAL EXAMINATION

OF

WILLIAM HITTINGER

TAYLOR & FRIEDBERG
Certified Shorthand Reporters
120 Washington Street
Morristown, New Jersey 07960
(973) 285-0411

* * * * *

[27]

* * * to win a case once it's indicted or the case is filed, but there are other times, I think you made reference to it. He said or gave you the impression that, without regard to the merits of the case, he was going to pursue it.

Can you explain that?

A. Well, I distinctly recall a comment to that effect. I can't quote it word-for-word, but it came through loud and clear to me, to the point that I was concerned, that I brought this matter to the attention of corporate counsel immediately after my testimony at the Grand Jury. It just seemed very, very strongly biased in the direction of winning the case regardless of the merits of the case itself.

Q. Now, when Mr. Valder made these comments irrespective of the merits, he wanted to pursue this to get a lucrative job, did the agents sitting there object or say anything or interrupt or disassocate themselves in any fashion?

A. My recollection is that they were totally silent. In fact, they were silent partners throughout the lunch. It turned out to [28] be a lunch, as I clearly recall it, in which, in the fact it was Valder having lunch with me and just by coincidence, two of his associates and, I assume, postal inspectors who were somehow involved, happened to be there at the same time. But I really don't know. It was puzzling to me why they were invited in the first

place. I never met them before, never saw them again. They were not in the Grand Jury hearings as far as I recall. Looking around the room, I don't remember seeing them there at all. So it was puzzling to me that they would be there initially.

But taking that as a matter of perhaps a friendly gesture on Valder's part, friendly to them and perhaps to me as well, I did observe that they sat there without any engagement of conversation at all.

Q. They didn't object to his comments about wanting to use this case to get a job—

A. No. They made no comment.

Q. Did anybody from the Justice Department, at any point in your subsequent * * *

MEMORANDUM **DOJ SEAL**

Subject:	Date:
Proposed REI Indictment	June 1, 1988

To:
Jay B. Stephens
United States Attorney

From:
Paul L. Knight
Chief,
Special Prosecutions

Charles S. Leeper
Deputy Chief,
Special Prosecutions

Over the past two months, Bill Block, Charlie Leeper, Rhonda and I have been meeting with Joe Valder and the two main investigators in the case (Postal Inspectors Frank Korman and Mike Hartman) to carefully review the proposed REI indictment.

The facts underlying this indictment are complicated and the evidence is entirely circumstantial. If this matter goes to trial, it will be a very difficult case and consume significant resources. At the same time, the stakes are very high in that the defendants appear to have corruptly attempted to obtain a 200 to 400 million dollar contract.

In general terms, one of our most difficult tasks has been to ascertain whether REI was guilty of criminal acts or just engaged in very aggressive, and even "sharp" business practices. There is no question that they played "hardball" with the Postal Service and their competitors; it is not as clear that their actions were criminal.

Set forth below is a description of the indictment, a history of the case, a discussion of the evidence and witnesses, and a discussion of how this case will impact on our resources.

I. The Indictment

The proposed indictment charges three defendants —Recognition Equipment, Inc. (REI), its CEO/ President William Moore and its vice President in Charge of Marketing Robert Reedy—in all eleven counts.

Count One charges conspiracy to violate the laws of the United States and to defraud the United States Postal Service and the citizens of the United States under several different theories.

Counts Two and Three charge all three defendants with aiding and abetting the payment of a gratuity ($19,000, airline tickets plus potential contract commissions) to Peter Voss, who was at the time a member of the Board of Governors of the United States Postal Service. Count Two charges that this amount was paid to obtain Postal Service contracts to manufacture Optical Character Readers (OCRs) and Count Three charges that this amount was paid to influence the selection of United States Postal Service employees favorable to REI.

Counts Four through Nine charge Mail Fraud (18 U.S.C. § 1341). Counts Ten and Eleven charge wire fraud violations (18 U.S.C. § 1343) for telephone calls made in furtherance of the scheme to defraud. The facts underlying each of these individual counts will be discussed more fully below.

Before discussing the history of the case, it should be noted that the prosecution team (Assistant United States Attorney Valder, and Postal Inspectors Hartman and Korman) as well as the defense team (John P. Cooney, Jr., Julie O'Sullivan and Milton C. Regal, Jr. of Davis Polk and Wardell (New York); Morris Harrell and Marshal M. Searcy of Locke, Purnell, Rain and Harrell (Dallas); Charles A. Stillman and Andrew Luger of Stillman, Friedman and Shaw (New York); and Robert S. Bennett and David Krakoff of Dunnells, Duvall, Bennett and Porter) have produced hundreds of pages in support of their positions for and against indicting this case. The Postal Inspectors have assembled several large volumes marshalling all the evidence in an effort to show circumstantially that the defendants were knowing members of the conspiracy and knowingly committed the ten substantive counts.

The defendants have prepared a three hundred page submission, a two hundred page attachment and other shorter submissions which argue, *inter alia*, that the case is *too* circumstantial, the likelihood of conviction is very small, some of our legal theories are flawed, that the defendants simply did everything lawfully possible to stop the Postal Service's decision to purchase a competitor's inferior optical character scanner, and finally that where there is no harm, no foul should be called. All three defendants are separately represented by very competent counsel.

It is noted that the following comments are not intended as criticisms of Joe Valder or the Inspectors assigned to the case. They have done a superb job collecting all available evidence. The reservations about the proposed Indictment are prompted solely by concerns as to the adequacy of the evidence.

II. A History of the Case

The REI case was originally assigned to Larry Barcella, and when he left the office, Joe Valder took over and has directed an exceptional investigation along with the Postal Service Inspectors.

Just prior to Larry's departure, and very early on in the investigation, United States Postal Service Board of Governor Peter Voss, (represented by Dick Janis and Larry Wechsler), won "the race to the courthouse" and became the first defendant to plead guilty. This was a somewhat unusual situation, since Voss would normally be a target whom we would indict after a lengthy investigation. His offer to plead guilty and cooperate, however, was considered at the time to be too good to reject.

Voss pled guilty in June of 1986 to accepting a gratuity based on his proffer that he had improperly taken payments relating to Postal Service matters. This appeared to be a favorable disposition at that point in the investigation because we had no evidence by which we could prove that these payments were really bribes.

Voss provided information about his arrangement with a consulting firm (John Gnau and Associates, Inc. or CAI) by which Voss would steer Postal Service business to several different corporations represented by Gnau in exchange for money.

Shortly thereafter, Gnau and one of his employees (Michael Marcus) agreed to plead guilty and cooperate with the government. Another GAI employee, William Spartin, was given immunity.

At that point the evidence relevant to this indictment showed that Peter Voss had approached Robert Reedy

of REI in September of 1984 and suggested that REI hire Gnau and Associates as REI's public relations/ lobbying representative (REI already had two lobbyists on their payroll). In October of 1984, Reedy met with Gnau in the DFW airport and they arrived at a verbal contract. No written contract was entered into at that time, but one was later executed in February 1985 and backdated to January 1985. This date is significant because the then REI Chairman of the Board (John Lawrence) was still with REI in the fall of 1984, but he retired at the end of January 1985. He was never informed by Moore or Reedy about their meetings with Voss or their decision to hire GAI.

The initial REI contract with GAI was for three $10,000 payments which would be applied against GAI's one per cent commission on any optical character reading (OCR) contracts which REI might get from the Postal Service. After each of these three $10,000 payments was made by REI to Gnau, Gnau paid Voss $3,000.

Later, Voss received four $2500 cash payments from Gnau which again had originated as consulting fees paid by REI to GAI. Throughout this time, Voss continued his support of REI's MLOCR (Multi Line Optical Character Readers) technology and to assist in ousting United States Postal Service officials not sympathetic to REI's positions.[1]

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[1] This case revolves around the MLOCR versus SLOCRs (Single Line Optical Character Readers) controversy which was and is a controversial issue in the Postal Service. The Postal Service had realized that it had to automate, and the issue was which kind of technology to utilize in connection with the Zip + 4 program. Originally, the Postal Service decided to go with MLOCRs rather than SLOCRs. However, in 1981 the Postal

The other co-conspirators described above were associated with Gnau and GAI. Marcus was introduced to the Postal Service's Board of Governors by Voss and, while appearing to be a neutral consultant, was pumping pro-REI position papers before the Board of Governors. Spartin, (who has been immunized), gave the appearance of not being asociated with REI or GAI and managed to obtain executive search contracts from the Postal Service which he used to find individuals sympathetic to REI.

There is no question or dispute from any quarter that there was an ongoing conspiracy between Peter Voss and the folks at GAI (Gnau, Marcus Spartin and others). REI and the other defendants contend, however, that they had no knowledge that anything illegal was occurring between their consultants (GAI) and Voss and that any illegal acts were GAI's idea in order to take advantage of their agreement that GAI would get 1% of any MLOCR contracts awarded to REI. REI correctly points out that not one of our cooperating co-conspirators can *directly* tie defendants Moore and Reedy into the conspiracy. Our case has been even further weakened by Peter Voss who, after great reflection while sitting in a federal prison camp, recently stated to Postal Service investigators that REI, Moore and Reedy knew nothing of the conspiracy.

Service decided that the less expensive SLOCR technology would be sufficient assuming the public voluntarily adopted the Zip + 4 program. This decision cut REI out of the very lucrative contracts as REI was the only U.S. company producing MLOCRs. REI knew that they had a chance only if they could swing the Postal Service back in favor of MLOCRs.

III. The Evidence In Support of the Indictment

Rather than starting with the conspiracy count (Count one), it may be helpful to start with discussions of the other counts about which the defendants are alleged to have conspired.

1. The Gratuities—Counts Two and Three

As noted above, Voss pled guilty to taking a gratuity as the result of money paid to him by GAI. While the evidence developed later showed that these payments from Gnau were really bribes, Voss will not say that (likely out of fear of the Parole Commission and also because of his personality). Voss is now saying that REI's MLOCR was the superior system, that he was firmly of the belief that Postal Service was making a grave error in going with SLOCRs and that he supported the MLOCR position to save the United States Postal Service money.

The evidence indicating that Moore and Reedy knew about the payments to Voss is not particularly strong and totally circumstantial. While we feel that there is enough evidence to get by an MJOA, whether there is enough evidence for convictions is questionable.

The case against defendant Robert Reedy is stronger than the case against defendant William Moore. In September 1984, Voss and Reedy had dinner at a Dallas restaurant. Voss told Reedy that REI had been too aggressive in its approach to the Postal Service and that REI should retain a new lobbyist—Gnau and Associates (GAI) PR firm. In October of 1984, Gnau and Reedy met at an airport concerning the retention of GAI. Gnau at one point tells Reedy not to use Voss' name and to simply refer to Voss as "our friend". On

several occasions after that (dates not certain except for once in May 1985), Reedy inquired of Gnau as to "what kind of arrangement do you have with Voss?" On each occasion Gnau told Reedy, "it is better that you don't know". In August of 1985, REI increased GAI's compensation to $22,000 per month, which would be deducted from the 1% commission if REI obtained the MLOCR contract. Gnau had been complaining that he and others had been working nearly full time since October 1984 for only $30,000. At the time that Reedy agreed to this increase, he told Gnau "I know you have people to take care of". On another occasion, in July of 1985, when REI was still pursuing a Postal Service contract, Reedy (and Moore) said to Gnau "why don't you get Peter Voss to order it sole source".

There are other pieces of circumstantial evidence indicating Reedy's guilty knowledge. As we noted before, John Lawrence, the Chairman of the Board, was not told about GAI during his last four months on the job and the actual contract was signed (and backdated) as Lawrence was leaving. In addition, Reedy lied to Postal Inspectors in April of 1986 as to how he had met John Gnau. In an earlier interview by Postal Service Inspectors conducted in November 1985, Reedy also claimed that he had never had direct contact with United States Postal Service officials. There are phone records showing numerous calls between Voss and REI at key times. Reedy was also aware that on several occasions, Voss was providing internal Board of Governors' memos and confidential information to Marcus (GAI) which were in turn given to REI.

Notwithstanding all of these actions, they still do not clearly prove that Reedy had knowledge of the payoffs. Reedy's conduct is also consistent with the defense

posture that while Reedy knew that Voss was helping REI, Reedy believed Voss was simply the only member on the Board of Governor's with the sense to realize the folly of SLOCRs.

The evidence against Moore is also totally circumstantial, but quantitatively even less than can be marshaled against Reedy. One of the earliest pieces of evidence which at first blush looked helpful may in fact undercut our case. In July 1984, Sharon Peterson, an unindicted co-conspirator and administrative assistant to Voss, made notes from a Moore-Voss telephone conversation. Among Voss' comments during this conversation were that he was "taking heat" and "working for you (Moore)". Unfortunately, this conversation was several months prior to the time that Voss suggested that REI hire GAI and prior to any payments from REI to GAI.

Other evidence developed against Moore includes Moore and Voss pretending not to know each other at a meeting of the Postal Service, Moore not informing the CEO and Chairman of the Board of Directors about his dealings with Voss and GAI, Moore's April 1985 notes which include "consultant-wired (Peter Voss)—inside vs outside control", and Moore on at least one occasion in July 1985 telling Marcus "why don't you have Peter Voss order a sole source award". Later in January/ February 1986, Moore and Reedy complained to Spartin about the lack of progress on the sole source contract.

Phone records also show numerous calls between Voss and Moore and others at REI during the period July, 1984 to December, 1984. Moore's diary contains what can best be described as notes reflecting discussions as to how the Postal Service was operating and

how it should be operating as well as the receipt of information from various closed Board of Governors meetings.

Unfortunately, none of the evidence shows direct knowledge by Moore of the payments to Voss through GAI. Even when the evidence is considered in light of Moore's close association with Reedy—from which one can infer that Moore knew of at least some of Reedy's conversations with Gnau—it proves no more than that Moore *probably* knew of the payments to Voss.

In addition to the above-described evidentiary problems, because Count Two charges the payment of gratuities to Voss on account of his activities relative to MLOCR contracts, there is a real danger that the trial could devolve into a debate of the relative advantages-disadvantages of MLOCRs and SLOCRs. Similarly, Count Three charges the payment of gratuities to Voss for having helped REI by providing confidential information concerning the removal and transfer of Postal service personnel opposed to MLOCRs, and for acting in REI's interest in the selection of a new Postmaster General. Again there is a danger that the trial could devolve into a debate over whether Voss did anything to assist in the removal of these senior Postal Service employees or whether they were removed for incompetence in supporting SLOCRs. This Count could also invite distracting evidence concerning the exceptional qualifications of the Postmaster General in question—Albert Casey.

MAIL FRAUD COUNTS

Count 4 through 9 charge violations of the mail fraud statute (18 U.S.C. § 1341).

COUNT FOUR

Count Four charges the use of the mails on August 12, 1985 to further defendant's fraudulent conduct in that the Postal Service mailed to REI a "letter inviting REI to demonstrate their MLOCR capability through the execution of competitive test agreements which were enclosed therewith".

At first glance, one questions how a mailed invitation for open, competitive bidding can be considered a mailing in furtherance of the scheme to defraud. Defense counsel will likely attempt to isolate this mailing from the rest of the facts and argue with some support that rather than furthering Voss' scheme it tended to obstruct it.

Our response which is based on the totality of all of the facts, seems somewhat strained. Prior to March 5, 1985, REI was ineligible to obtain any OCR production contracts. However, the government argument goes, due to corrupt and illegal conspirators' acts from July 1, 1984 to August 12, 1985, they were successful in causing USPS to turn away from the SLOCR approach to a MLOCR approach, culminating in the USPS contracting officer mailing *competitive* test agreements to REI as the beginning of a process to award production contracts to retrofit phase II SLOCRs and to manufacture stand alone MLOCRs.

It is our opinion that a judge might well grant a motion for judgment of acquittal on this count on the ground that the evidence fails to show a furtherance of

the scheme to defraud. Even assuming we could survive an MJOA, it is recommended that this count be deleted from the indictment because its link to the scheme to defraud is so tenuous. While it could legally be charged, it is felt that defense counsel would have a field day in closing argument—claiming that the indictment even charges the defendants with mailings that initiated a *competitive* contracting process.

COUNT FIVE

The mailing in this count involves memorandum prepared by Postal Service staff for the members of the Board of Governors (including USPS Governor William Sullivan) which summarize the November 4, 1985 meeting of the Technology Committee. During the course of this November 4 meeting, Peter Voss gave Michael Marcus, for delivery to REI, confidential information and written materials from REI's competitor, ECA. (See Overt Acts 66-67) This information would arguably give REI an advantage when it made its presentation to the Technology Committee after ECA's presentation. The theory of this mail fraud count would be that after the November 4, 1985 status presentations to Postal officials were manipulated by REI, the results of the presentations—including summary memos and transcripts—were mailed to all Board members, including Sullivan, for use in making OCR and personnel/PMG decisions. However, it appears that much of the ECA information which Voss channeled to REI was publicly available at the time of the hearing and all of it within a day or two thereafter, and it may be difficult to show how REI made use of any non-public proprietary information.

COUNTS SIX AND SEVEN

Counts Six and Seven charge similar mailings—different contracts offered by the Postal Service to William Spartin to search for top level Postal Service employees. Count Six charges a December 13, 1985 mailing from David Harris to Spartin of a contract to find an interim Postmaster General; Count Seven charges a December 16, 1985 mailing between the same parties of a contract to find a permanent Postmaster General.

These mailings were in furtherance of the charged scheme to defraud the citizens of the United States of their right to have the Postal Service make fair and unbiased administrative decisions pertaining to the selection, assignment and termination of Postal Service officials. (See Paragraph 12(e) of Count One, pp. 9 and 10 of the May 12 Draft).

The basic problem with these two counts is their vulnerability to the argument that there was "no harm", therefore there should be "no foul". Although Albert Casey was selected following the recommendation of William Moore, Casey—a man with an impeccable record both before and after his selection as the interim Postmaster General—will testify that each and every one of his actions was proper and above board with absolutely no advantage being accorded to REI or William Moore. (In reality Moore probably recommended Casey because he felt that someone who knew him would be less likely to rule out his MLOCR machinery. The GAI scheme to defraud, in any event, was discovered shortly after Casey came on board and hence Casey was even more on guard to keep his behavior on the straight and narrow).

As to Count Seven, Spartin never had the opportunity to select the permanent Postmaster General, and hence the mailed contract was never fulfilled—an even stronger "no harm, no foul" situation. An additional concern is that the co-conspirator who was involved in these contracts—Spartin—was given immunity.

COUNT EIGHT

Count Eight charges the mailing of a letter by a Washington, D.C. Postal employee working in the office of Contracts to the New York processing center which authorized paying Spartin's MSL Corporation nearly $31,000 relative to the identification of Albert V. Casey as the interim Postmaster General.

While this mailing would technically qualify as a mail fraud count, it appears to be overreaching to charge Moore and Reedy with such an offense. Spartin, who got immunity, tried to scam the Postal Service out of nearly $31,000 for finding the interim PMG when all he did was make a couple of phone calls to Moore and Reedy to solicit recommendations. If any major "foul" was committed in this count, it was committed by William Spartin.

It is again recommended that this count be deleted from the indictment because it may cause more harm than good. Defense counsel would have another field day pointing out to the jury how the guy who tried to scam the Postal Service got $31,000 and was never prosecuted, while the defendants (Moore, Reedy and REI), who recommended a competent and impartial candidate, didn't get one penny.

COUNT NINE

Count Nine charges the March 31, 1986 mailing of a letter from Peter Voss in Canton, Ohio to David Harris, the Secretary to the Board of Directors.

This mailing was the last in a series of sole source proposals secretly written by REI (Marcus) and funneled through Peter Voss in order to obtain a MLOCR production contract and USPS money for REI. It can be successfully shown to be fraudulent only if we can persuade a jury that Moore and Reedy knew Voss was being paid for his efforts on behalf of MLOCR technology.

THE WIRE FRAUD COUNTS
COUNT TEN

Count Ten charges that on December 12, 1985, defendant William Moore, while in Dallas, Texas, telephoned (immunized co-conspirator) William Spartin in Washington, D.C. in furtherance of the scheme to defraud. This telephone call involved Moore telling Spartin that he (Moore) had talked to Casey the previous evening and that Casey was interested in becoming the interim PMG.

This Count, which is related to Count Six, poses the same problem described above at page 7—that since there is no harm, there should be no foul. One significant difference from Count Six is that Count charges acts directly performed by one of the defendants—William Moore—as opposed to one of the unindicted co-conspirators. However, does a competitor's recommendation of a candidate who might be expected to favor the competitor rise to a criminal level because the

competitor believes his recommendation will be accepted?

COUNT ELEVEN

The final count of the indictment charges that defendant Robert Reedy furthered the scheme to defraud in a telephone call from REI's Dallas headquarters to unindicted, co-conspirator William Spartin.

After the Postal Service's Board of Governors discovered Spartin's relationship with GAI and terminated Spartin's Postmaster General search contract on March 3, 1986, Spartin (in New York) and Reedy (in Dallas) had a telephone conversation about the cover-up of Spartin's USPS-GAI-REI conflict of interest. On the next day, there was a similar telephone conversation between Spartin in D.C. and Reedy it Dallas. Spartin says that in these telephone conversations, he told Reedy that he (Spartin) was preparing a back-dated letter of resignation from GAI so as to conceal his association with REI's consultant during the same time he was serving as consultant to the Postal Service. Spartin says Reedy asked Spartin to keep him posted. Spartin also asked Reedy if Moore would say that he (Moore) contacted Spartin to recommend Casey rather than acknowledging that Spartin solicited the recommendation. There is no corroboration for Spartin's version of these calls and, in fact, Moore told Postal Inspectors in April 1986 that Spartin has contacted Moore for a PMG recommendation.

COUNT ONE - CONSPIRACY

Count One charges that Moore, Reedy, REI and numerous co-conspirators conspired to violate numerous laws of the United States and to defraud the

United States under several different theories. (See paragraph 12 of Count One located at pp. 6-10 of the Indictment). It charges that (1) they directly and indirectly offered a public official (Peter Voss) a gratuity in violation of 18 U.S.C. § 201 (f) and (g); (2) that they conspired to steal property belonging to the United States valued at more than $100 in violation of 18 U.S.C. § 641; (3) that they conspired to steal property of the U.S. Postal Service which was valued at more than $100 in violation of 18 U.S.C. § 1707; (4) that they conspired to use the mails and interstate wires to further their scheme to defraud in violation of 18 U.S.C. § 1341 and § 1343 (including the mailings and wires charged in Counts 4 to 11). This Count further charges that the defendants and co-conspirators conspired; (5) to defraud the United States Postal Service (USPS) and the citizens of the United States of the benefits of competitive bidding in governmental procurements of optical scanning equipment; (6) to defraud the USPS and United states citizens of the honest and faithful services of its officers and employees (Peter Voss); (7) to defraud the USPS and United States citizens of their right to the confidential use of USPS internal information; and (8) to defraud the USPS and the United States citizens of their right to have fair and unbiased decisions relating to the hiring and firing of the Postal Service's officials and employees. The evidence in support of these charges is complicated and totally circumstantial. The different theories supporting the conspiracy include:

(1) The Conspiracy to Offer a
Gratuity to a Public Official

As described above in the discussions of Counts Two and Three (pp. 4-6), the evidence is clear and direct that Gnau, Marcus, Spartin and others conspired to pay money to public official Peter Voss on account of his official acts and that Peter Voss sought these gratuities. The evidence, however, that Moore, Reedy and REI joined this conspiracy is totally circumstantial. The evidence needed to support this aspect of Court One is essentially the same as in our discussion of Counts Two and Three.

(2) and (3) Conspiracy to
Steal Property of the United
States and the Postal Service

Count One further charges that the defendants and others conspired to steal property belonging to the United States having a value greater than $100 in violation of 18 U.S.C. § 641, and (b) property belonging to the Postal Service having a value greater than $100 in violation of 18 U.S.C. § 1707. These two objects are essentially the same and hence, if it is decided to seek a conspiracy indictment, one of these objects should be dropped from the indictment.

This portion of the conspiracy count may be more complicated than appears at first glance. The specific information and documents provided by Voss to GAI and REI is difficult to identify. It will be even more difficult to prove that the information had a value of greater than $100. Accordingly, the Court may require a special verdict form because the possibility exists that

the jury could come back with a misdemeanor as the sole underlying offense.

This aspect of the conspiracy count also has considerable nullification potential. In one of his interviews, Marcus made a statement that he got as much insider information from USPS Governor Ruth Peters as he did from Voss. Peters is not charged with any illegality in this case, but she was in reality doing much of what Voss did. Moreover, it could be argued that in business it is common practice to release certain amounts of information in order to test your ideas and strive to get a better work product. Once again we approach the no harm, no foul considerations.

(4) and (5) Conspiracy to
Use the Mails and Wires in
Furtherance and Execution
of the Scheme to Defraud

This theory will obviously encompass Counts Four through Eleven of the Indictment and the discussion above concerning these counts will also be relevant here. In addition to those counts, however, will be the numerous phone and wire fraud violations which occurred outside the District of Columbia but which are alleged to be in furtherance of the conspiracy.

(6) to (9) Conspiracy to
Defraud the United States

Count One also charges conspiracy to defraud the United States under several different theories. As with all of our earlier discussions, it is clear that a conspiracy to defraud existed, but it is not as clear that the defendants listed in this indictment joined that con-

spiracy. As we discussed above, this part of the conspiracy charge may put the entire Postal Service on trial. While the trial court should restrict this from happening, it will take a very strong judge to rein the three defense teams in. If the Postal Service is put on trial, our chances of prevailing in this matter will decrease.

Rather than try to summarize all of the evidence in this case in this memo, it is recommended that one review the attached *Details of the Offense* which provides an excellent summary and index of the key events in the case.

cc: William J. Birney
William R. Martin
Charles S. Leeper
William S. Block
Joseph B. Valder

U.S. POSTAL SEAL

CHIEF POSTAL INSPECTOR
Washington DC 20260-2100

MAY 13, 1988

Honorable Jay Stephens
United States Attorney
District of Columbia
555 Fourth Street, NW
Washington, DC 20001-2733

Dear Mr. Stephens:

I am submitting this letter to urge a timely decision relative to the prosecution of Recognition Equipment, Inc., William G. Moore and Robert Reedy. My purpose is not to detail the evidence of their guilt or innocence, but rather to discuss the effect of delaying the decision on the Inspection Service's ability to effectively protect Postal Service assets and to maintain the integrity of various postal systems.

As you are aware, the fraudulent activity involving Peter Voss, then Vice Chairman of the Postal Service Board of Governors, and REI included the manipulation of the Postal Service's billion dollar automation program and managerial staffing at the highest levels. Their actions, motivated by greed, materially eroded the economy, efficiency and integrity of an agency, the Postal Service, its 800,000 employees and the rate paying public.

On May 30th, it will be two years since Voss' guilty, plea and public notice of his corrupt actions. The message was swift and clear. The timely prosecution of public corruption was a high priority throughout the law enforcement community.

The Postal Service acted quickly by indefinitely suspending the competitive procurement corruptly influenced by Voss. REI was one of only two participants in that procurement which included an anticipated award in the range of 250 to 400 million dollars. It was announced that the suspension would furnish the Inspection Service and United States Attorney an opportunity to determine the scope of Voss' corrupt influence and the participation of others. The USPS followed this approach for six months until shortly after the guilty plea of John Gnau (REI's consultant). At that time, they awarded a sole source contract to ECA for the equipment. By this time, the Postal Service had lost valuable time and countless millions of dollars in lost savings.

The Postal Service, however, could not erase Voss and REI's influence and was tasked with developing a new program to procure next generation automated mail reading, coding and sorting equipment. The new program was unleashed during the winter of 1987 and includes a competitive "run-off" among several vendors during the summer of 1988. REI, under the same management, is a participant in that program and will receive $3,976,500 for their participation. To date, following Voss' plea, REI has received USPS developmental funding in the amount of $994,125, with $1,391,775 payable in May 1988 and an additional $1,590,600 payable in July 1988 following the competitive "run-off". If they win the competition, they

could receive a multi-million dollar award during late 1988.

REI has also expressed interest in a related optical automation project and may be awarded a portion of $15 million in developmental funding as early as June 1988.

Jay, I think you can see our dilemma. The Inspection Service has information relevant and material to the Postal Service's procurement decision. But in the interest of the criminal investigation and in compliance with Grand Jury Secrecy regulations, we have not disclosed to postal management evidence indicative of REI's knowing participation in a scheme to manipulate and circumvent administrative and procurement activity of the Postal Service.

We have always believed that a thorough but prompt and aggressive investigation was the most effective method to combat fraud. The Inspection Service stands ready to furnish the resources to that end.

During October 1987, counsel for REI was advised by your office that the investigation disclosed evidence that indicated the corporation and two of its officials knowingly participated in a scheme to bribe Voss and defraud the government. Within days, REI released those comments to the public. I understand that REI furnished your office their position on this whole matter during the first week of February 1988. The Inspection Service, working closely with Assistant U.S. Attorney Joseph Valder submitted a rebuttal to REI's submission that same week.

I am the first to acknowledge the complexity of this matter and the resources required for its successful prosecution. I am also aware of the recent turnover in

your Special Prosecutions Section, the personal demands of a transitional period, and other priority investigations.

I request that you weigh the evidence and make your determination in a timely manner. The adverse impact to the victim, the USPS and the rate paying public, is continuing. Any further delay could severely impact this summer's procurement and undermine the integrity of the procurement system as a whole.

Thank you for your anticipated prompt attention to this matter. If you would like to discuss the investigation further, please telephone me at 268-4267.

Sincerely,

/s/ C. R. CLAUSON
C. R. CLAUSON

U.S. POSTAL SEAL

CHIEF POSTAL INSPECTOR
Washington DC 20260-2100

July 27, 1988

Honorable Jay Stephens
United States Attorney
District of Columbia
555 Fourth Street N.W.
Washington, DC 20001-2733

Dear Mr. Stephens:

This letter is a follow-up to my May 13, 1988 letter (copy attached) which urged a timely decision relative to the prosecution of Recognition Equipment, Inc., William G. Moore and Robert Reedy. Frankly, Jay, I am disappointed by your office's failure to act on this matter and the series of broken promises from your staff (review committee) relative to the date and nature of their recommendation.

On June 1, my case agents met with you, your senior staff and the review committee to discuss the evidence indicative of REI and its officers' knowledge and participation in a conspiracy to bribe Peter E. Voss and defraud the Postal Service. You assured us that the decision to charge REI, et al., was on the "front burner."

On that same date, without the benefit of discussion during the above described meeting, the review committee submitted a memorandum to you discussing the results of their review. The memorandum, dated exactly fifteen (15) weeks after the first joint review

committee/Postal Inspector meeting and weeks after initially promised, did not reflect our understanding of the consensus recommendation and viewpoint of the committee. In fact, the memorandum contained no discernible recommendation and consisted primarily of a superficial critique of the case. We have been told point-blank by members of the committee that their recommendation is to indict, at a minimum, Moore and Reedy.

My Inspectors were then told that a second memorandum would include a clear recommendation and an outline to charge the case in a manner least susceptible to attack by the defense. The memo has been promised but not furnished for several weeks.

Jay, it has been four years, since Peter Voss and REI began a dialogue that resulted in a conspiracy that shook the most critical procurement and operational program undertaken by the Postal Service at that time. Three and one-half years ago, REI dangled a four (4) million dollar carrot in front of Voss and the consultant that Voss recommended they hire. Voss' actions are history, but the shadow of the conspiracy and this investigation still hang over the Postal Service.

I, for one, am embarrassed by the inability of our respective staffs to bring this matter to a timely resolution. I am embarrassed that nine months ago, counsel for REI was brought into the United States Attorney's Office and told that there is sufficient evidence to return an indictment against the corporation and two of its officers and to date the matter has not been resolved.

Your staff has now had over five months to review the defense submission and a detailed chronology of the

offense prepared by Postal Inspectors. Over the past year, countless position papers have been drafted by Joseph Valder and law clerks relative to REI's knowledge and participation in the conspiracy. The consensus has been that the evidence is sufficient to sustain a conviction when analyzed in light of relevant case law.

Joseph Valder, who has nearly 18 years of experience as a prosecutor and recent success in one of the largest federal corruption cases prosecuted in this district, has interviewed and evaluated all the key witnesses in this matter. Simply stated, your office has had available to it a wealth of information to make this decision.

Further delay, as it taxes the memory of the witnesses, can only hinder our ability to present the case to the trier of fact. Coincidentally that delay also erodes the credibility of the law enforcement community.

My investigative resources have been idled while your office ponders and exhaustively reviews this case. Our respective agencies can ill afford the waste of resources, but most importantly, we can ill afford the diminished respect and faith of those we serve.

If there are any shortcomings on our part, I will be happy to correct them. Otherwise, I would appreciate anything you can do to bring this matter to closure.

Sincerely,

/s/ C. R. CLAUSON
C. R. CLAUSON

Attachment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term
Grand Jury Sworn in on Oct. 7, 1986

UNITED STATES OF AMERICA

v.

RECOGNITION INCORPORATED, WILLIAM G. MOORE, JR, ROBERT W. REEDY

Criminal No.

Grand Jury Original

Violations: 18 U.S.C. §§ 371, 1707, 1341, 1343, 2(a), 2(b) (Conspiracy, Theft of Property Used by the Postal Service, Mail Fraud, Wire Fraud, Aiding and Abetting, Causing an Act to be Done); 22 D.C.C. §§ 3832(a), 3832(c)(1), 105 (Receiving Stolen Property, Aiding and Abetting)

INDICTMENT

The Grand Jury Charges:

COUNT ONE

1. At all times material herein, the United States Postal Service (hereinafter sometimes referred to as "Postal Service" or "USPS") was a department, agency and independent establishment of the executive branch of the government of the United States.

a. Among the official functions of the Postal Service was the duty to accept and deliver articles placed in the United States mails.

b. Among the official programs of the Postal Service was the development, procurement, deployment and maintenance of automated systems to read, code and sort the United States mails.

c. Beginning in or about 1960, the Postal Service entered into contracts with private companies for research, development and production of automated systems which would read, code and sort the United States mails.

d. Among the automated sorting systems and equipment developed by various private companies were single-line optical character reading (hereinafetr sometimes referred to as "SLOCR") equipment and multiline optical character reading (hereinafter sometimes referred to as "MLOCR") equipment.

2. At all times material herein, the exercise of the power of the Postal Service, including the authority to direct and control expenditures and to review the practice and policies of the Postal Service, was directed by the Board of Governors of the United States Postal Service (hereinafter sometimes referred to as "Board of Governors" or "Board"), which consisted of up to nine Governors, appointed by the President of the United States with the advice and consent of the United States Senate, and the Postmaster General (hereinafter sometimes referred to as "PMG") and the Deputy Postmaster General.

a. The Governors were to represent the public interest generally.

b. Among the powers of the Governors, sitting without the Postmaster General and Deputy Postmaster General, were the powers (1) to appoint and remove the Postmaster General and (2) to delegate

authority vested in it to the Postmaster General who was the chief executive officer of the Postal Service and responsible for its overall honest, efficient and economical operation.

c. In part, the Board accomplished its duties and work through various committees which gathered information on behalf of said Board but which did not have decision-making authority for said Board, and among these committees, at various times, were

(1) the Contingency Committee, which was to gather information on behalf of the Board pertaining to personnel and Postmaster General selections;

(2) the Technology and Development Committee (hereinafter sometimes referred to as the "Technology Committee"), which was to gather information on behalf of said Board and to assist said Board in considering policies and issues in the areas of technology innovation, research and development and automation; and

(3) the Planning and Executive Resource Committee, which was to gather information and assist the board in considering long-range personnel planning to fill top management jobs.

d. The Board of Governors was required by law to take official action only at duly convened meetings when there was an official quorum present; conversely, the committees of, individual members and groups of members of the Board of Governors were not authorized to take action or make decisions for said Board.

e. The Postal Service and its Board of Governors were duly authorized by statute and regulation to close portions of the Board meetings to the public where the Board determined that the public interest

did not require otherwise and when the closed portions of the meetings were likely to, among other things, (1) relate solely to the internal personnel rules and practice of the Postal Service and (2) disclose information the premature disclosure of which would be likely significantly to frustrate implementation of a proposed action of the Board relating to proposed Postal Service procurement activity.

f. Governors were prohibited from using inside information, that is, information obtained under Postal Service or other Government authority which had not become part of the body of public information, obtained as a result of his or her Postal Service employment for private interest or gain for said Governors or another person either by direct action on his or her part or by counsel, recommendation, or suggestion to another person.

3. In or about 1979 and 1980, one of the operational and procurement issues pending at the Postal Service was the extent to which the USPS should utilize SLOCR equipment or MLOCR equipment which was designed to read, code and sort the mail, and the Postal Service determined:

a. that the mailers' acceptance and use of a 9 digit Zip Code ("Zip + 4") was important to the economy and efficiency of the Postal Services's program to automate its mail processing function,

b. that SLOCR equipment could read, code and sort mailpieces which contained a 9 digit Zip Code more efficiently and economically than MLOCR equipment could read, code and sort mailpieces which did not contain the 9 digit Zip Code and

c. that it would obtain SLOCR equipment through its normal and regular procurement processes.

4. At all times material herein, defendant RECOGNITION EQUIPMENT, INCORPORATED (hereinafter sometimes referred to as "REI") was a Delaware corporation, headquartered in Dallas, Texas, engaged, in part, in the design, manufacture and distribution of optical character reading equipment, which:

a. prior to 1982, developed and sold MLOCR equipment prototypes to the USPS and

b. beginning in or about 1982, unsuccessfully competed for the second phase of the USPS SLOCR equipment procurement contract which was awarded to a company named ElectroCom Automation, Inc. (hereinafter sometimes referred to as "ECA") on or about July 10, 1984.

5. At all times material herein, defendant WILLIAM G. MOORE, JR. was the chief executive officer, sometimes called President, and, at various times material herein, the Chairman of the Board of Directors of defendant RECOGNITION EQUIPMENT, INCORPORATED with annual compensation of a salary of at least $200,000 per year and an incentive bonus "equal to five percent of Recognition's consolidated income before income taxes" plus other benefits.

6. At all times material herein, defendant ROBERT W. REEDY was the Vice President of Marketing at defendant RECOGNITION EQUIPMENT, INCORPORATED and a participant in REI's executive benefit and incentive plans.

7. At all times material herein, Peter E. Voss, not named as a defendant in this Indictment, was,

a. prior to May 30, 1986, a member of the Board of Governors of the United States Postal Service, and was, at various times, (1) a member of the Board of Governors Contingency Committee, (2) a member of the Board of Governors Technology and Development Committee, (3) a member of the Board of Governors Planning and Executive Resources Committee, and (4) the Vice Chairman of said Board of Governors; and also was

b. President and owner of Decision Systems, Inc., an Ohio company which was engaged primarily in the sale of specialty parts and equipment to industrial and municipal concerns.

8. At various times material herein, Sharon R. Peterson, not named as a defendant in the Indictment, was the administrative assistant to Peter E. Voss at Decision Systems, Inc., and in his official position as a Governor of the United States Postal Service.

9. At various times material herein, John R. Gnau, Jr., not named as a defendant in this Indictment, was associated with and part owner of the following public relations firms: Gnau, Carter, Jacobsen and Associates, Inc.; John R. Gnau, Jr and Associates, Inc.; and Gnau & Associates, Inc. (hereinafter sometimes collectively referred to as "GAI").

10. At various times material herein, Michael B. Marcus, not named as a defendant in the Indictment, was a Director and the Treasurer of Gnau, Carter, Jacobsen and Associates, Inc., and a Director, the Vice President and Treasurer of Gnau & Associates, Inc.

11. At various times material herein, William A. Spartin, not named as a defendant in the Indictment, was President of Gnau & Associates, Inc., and

President and Managing Director of MSL International Consultants Limited, an executive placement firm.

12. From in or about July, 1981, the exact date being unknown to the Grand Jury, and continuing to on or about October 1, 1986, within the District of Columbia, the States of Michigan, Ohio, Illinois, Maryland, and Texas, the Commonwealth of Virginia and elsewhere, defendants RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR., and ROBERT W. REEDY and Peter E. Voss, Sharon R. Peterson, John R. Gnau, Jr., Michael B. Marcus, William A. Spartin and others known and unknown to the Grand Jury willfully, unlawfully and knowingly did combine, conspire, confederate and agree together and with each other to defraud the United States and to commit offenses against the United States; more particularly, the defendants and Peter E. Voss, Sharon R. Peterson, John R. Gnau, Jr., Michael B. Marcus and William A. Spartin did combine, conspire, confederate and agree together and with each other:

a. to defraud the United States Postal Service and the citizens of the United States of America of their right to have the Postal Service make fair and unbiased operational and procurement decisions, including their right to have the benefits of competition in governmental procurements, pertaining to the deployment and procurement of optical character reading equipment, free from cheating, deceit, fraud, theft, embezzlement, dishonesty, corrupt influence, official misconduct, payment of gratuities conflict of interest, false representations, unjust influence, bid rigging, circumvention of government contracting procedures, and breaches and omissions of fiduciary and contract duties, in violation of Title 18, U.S. Code, Section 371;

b. to defraud the United States Postal Service of its right to the confidential and exclusive use, prior to any officially approved publication, of discussions and deliberations of (1) closed Board of Governors meetings, (2) closed Board committee meetings, (3) closed meetings of its officials and employees and (4) closed meetings of any combination of the foregoing entities and individuals and documents relating to those discussions and deliberations, free from cheating, deceit, fraud, theft, embezzlement, dishonesty, corrupt influence, official misconduct, payment of gratuities, conflict of interest, false representations, unjust influence, bid rigging, circumvention of government contracting procedures, and breaches and omissions of fiduciary and contract duties, in violation of Title 18, U.S. Code, Section 371;

c. to defraud the United States Postal Service and the citizens of the United States of America of their right to the loyal, honest, faithful and disinterested service, action and performance of official duties of its officers and employees, that is, of United States Postal Service Governor Peter E. Voss, free from cheating, deceit, fraud, theft, embezzlement, dishonesty, corrupt influence, official misconduct, payment of gratuities, conflict of interest, false representations, unjust influence, bid rigging, circumvention of government contracting procedures, and breaches and omissions of fiduciary and contract duties, in violation of Title 18, U.S. Code, Section 371;

d. to defraud the United States Postal Service and the citizens of the United States of America of their right to have the Postal Service make fair and unbiased administrative decisions pertaining to the selection, assignment of duties and termination of Postal Service

officials, including the procurement of the services of a new postmaster General, free from cheating, deceit, fraud, theft, embezzlement, dishonesty, corrupt influence, official misconduct, payment of gratuities, conflict of interest, false representations, unjust influence, bid rigging, circumvention of government contracting procedures, and breaches and omissions of fiduciary and contract duties, in violation of Title 18, U.S. Code, Section 371; and

e. to commit offenses against the United States in violation of Title 18, U.S. Code, Section 371, including:

(1) to embezzle, steal, purloin and knowingly convert to their own use and the use of each other, things of a value in excess of $100, belonging to the United States Postal Service, an agency of the United States, that is, confidential internal information, memoranda and documents, in violation of Title 18, U.S. Code, Section 641 [Theft of Government Property];

(2) to steal, purloin and embezzle property with a value in excess of $100, used by the Postal Service, that is, a booklet entitled "Presentation To Members Of The Board Of Governors And Management Of The USPS," which was the property of ElectroCom Automation, Inc., a body corporate, and appropriate such property to their own use and other than its proper use, in violation of Title 18, U.S. Code, Section 1707 [Theft of Property Used by Postal Service];

(3) to use the United States mails and cause the use of the mails in furtherance of and for the purpose of executing a scheme and artifice to defraud and for obtaining money and property by means of false

and fraudulent pretenses, representations and promises, which scheme and artifice is set forth more fully in paragraphs Thirteen and Fourteen of Count One of this Indictment, which are alleged and incorporated herein by reference as though fully set forth herein, in violation of Title 18, U.S. Code, Section 1341 [Mail Fraud];

(4) to transmit and cause to be transmitted, by means of wire communication in interstate commerce, signals and sounds in furtherance of and for the purpose of executing a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, which scheme and artifice is set forth more fully in paragraphs Thirteen and Fourteen of Count One of this Indictment, which are alleged and incorporated herein by reference as though fully set forth herein, in violation of Title 18, U.S. Code, Section 1343 [Wire Fraud];

(5) directly and indirectly, otherwise than as provided by law for the proper discharge of official duty, to give, offer and promise something of value to a public official for and because of an official act performed and to be performed by such public official, in violation of Title 18, U.S. Code, Section 201(f) [Payment of a Gratuity to a Public Official]; and

(6) being a public official, otherwise than as provided by law for the proper discharge of official duty, directly and indirectly, to ask, demand, exact, solicit, seek, accept, receive and agree to receive something of value for himself for and because of an official act performed and to be performed by him, in violation of Title 18, U.S. Code, Section 201(g) [Receipt of a Gratuity by a Public Official].

MEANS AND METHODS USED IN SEEKING TO ACHIEVE THE OBJECTS OF THE CONSPIRACY

13. It was a part of the conspiracy that defendants RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR., and ROBERT W. REEDY, and Peter E. Voss, Sharon R. Peterson, John R. Gnau, Jr., Michael B. Marcus and William A. Spartin (all of whom may be hereinafter referred to by their last names), in order unjustly, unlawfully and illegally to enrich themselves and other businesses, trusts, and corporations which they directed and controlled, by undermining and manipulating the decision-making, contracting and procurement processes of the United States Postal Service for the purpose of receiving and attempting to receive and otherwise obtain certain tangible and intangible properties, that is, Postal Service confidential internal information, confidential internal documents, awards of USPS personnel search contracts and production contracts for optical character reading equipment, and money, which would be received and obtained as the result of cheating, deceit, fraud, theft, embezzlement, dishonesty, unlawful influence, official misconduct, the payment of gratuities, conflict of interest, false representations, unjust influence, bid-rigging, circumvention of government contracting procedures, the denial of the benefits of competition in government procurements, and breaches and omissions of fiduciary and contract duties, and, thereafter, in fact, to accomplish their objects, and to hide, conceal and cover up the accomplishment of their objects, would and did use the following means and methods, among others:

a. Commencing in or about July, 1981, and continuing throughout the remainder of the conspiracy, by means of regular and frequent telephone, written and in-person communications involving varying combinations of said defendants and unindicted co-conspirators, defendants REI, MOORE, REEDY and all unindicted co-conspirators would and did become knowledgeable of and aware of the identity and role of each other and the strategies and tactics being pursued and utilized by each other, illegally and unlawfully, to achieve their objectives;

b. At all times material to this Indictment, defendants MOORE and REEDY would and did personally and knowingly develop and actively exercise control and responsibility over important details and aspects of defendant REI's USPS optical character reading equipment marketing strategies and efforts;

c. Throughout the life of the conspiracy, all defendants and unindicted co-conspirators would and did use the United States mails and interstate wire communication facilities between and among the District of Columbia, the States of Texas, Michigan, Ohio, Illinois, Maryland and New York, the Commonwealth of Virginia and elsewhere in furtherance of and for the purpose of executing their scheme and artifice to defraud and for obtaining money and property;

d. In July of 1984, during deliberations by the Board of Governors concerning authorization of an imminent contract award in the second phase of the USPS SLOCR equipment procurement, Voss and Peterson would and did steal, purloin, embezzle and communicate internal, confidential and exclusive information belonging to the USPS and the Board of Governors to defendants MOORE and RECOGNITION

EQUIPMENT, INCORPORATED, an official competitor in that same procurement;

e. Commencing in the late summer of 1984, soon after a SLOCR equipment contract award to one of defendant REI's competitors and after a USPS decision to evaluate the merits of procuring and deploying MLOCR equipment by having the then current USPS SLOCR equipment contractors, which did not include defendant REI, attempt to develop multi-line reading conversion kits for their SLOCR equipment, defendants REI, MOORE and REEDY would and did meet and speak privately with United States Postal Service Board of Governors member Peter E. Voss and cause him to assist REI in attempting to obtain a MLOCR equipment production contract by, among other things, agreeing, at Voss' repeated recommendation, to hire, as REI's MLOCR equipment "marketing consultant," GAI, a small firm from Michigan which had an unlawful agreement to pay Voss referral fees;

f. Commencing in January of 1985, Voss would and did arrange (1) for Gnau and Marcus to meet with Postmaster General Paul N. Carlin for the purpose of discussing optical character reader equipment on behalf of defendant REI and (2) for William A. Spartin to meet with PMG Carlin, Deputy PMG Jackie A. Strange and Board of Governors Chairman John R. McKean pertaining to high level personnel matters, while the unindicted co-conspirators, and later the defendants, would and did agree to conceal Spartin's relationship with GAI and REI from the United States Postal Service and its Board of Governors;

g. The day before the Gnau-Marcus-Carlin meeting referred to in subparagraph (f) above, defendant REI, through defendant REEDY, would and

did authorize Gnau to represent REI at his meeting with Carlin in REI's attempts to obtain MLOCR equipment business from the Postal Service, and REEDY, with defendant MOORE's approval, would and did dispatch by means of a courier a $10,000 check to Gnau;

h. In late February, 1985, contemporaneous with defendant MOORE becoming Chairman of defendant REI's Board of Directors, REI, by defendant REEDY, as authorized by MOORE, signed a consulting agreement with GAI backdated to January 15, 1985, whereby REI agreed to pay CAI a retainer fee of $30,000 in three equal payments as part of a one percent commission fee if REI received a USPS MLOCR equipment production award and whereby, as later amended, along with another consulting agreement, REI paid approximately $295,000 to GAI, of which approximately $19,000 was paid to Voss, during the period from January 10, 1985, to October 1, 1986;

i. Commencing early in 1985, Voss would and did manipulate events to arrange the introduction of the defendants and Marcus and Gnau to Board member Ruth O. Peters who was the Chairperson of the Board's Technology and Development Committee, and, thereafter, the defendants, along with Voss, Peterson, Gnau and Marcus, through trickery and deception, would and did cause, and attempt to cause, Governor Peters to endorse defendant REI's automation proposals and MLOCR equipment, while simultaneously concealing Voss and Peterson's agreement, association and prior dealings with the defendants and Gnau, Marcus and Spartin from Governor Peters, the remaining Governors and USPS officials;

j. During the winter and spring of 1985, defendants REI, MOORE and REEDY would and did pay GAI three $10,000 payments with Gnau thereafter causing three check payments from that money, totalling $9,000, to issue from GAI to Voss, while Voss, Gnau, Marcus and Spartin would and did contemporaneously agree to share equally in the one percent contingent commission fee from REI for and because of Voss' official actions on behalf of all defendants and unindicted co-conspirators;

k. Commencing in early 1985, the defendants and unindicted co-conspirators would and did, through Voss, gain access to the Board of Governors and thereafter evade and attempt to evade the normal, proper and regular procurement procedures and processes of the USPS by causing, and attempting to cause, the Technology Committee to go beyond its lawful and proper power and authority by interjecting itself into the normal, proper and regular day-to-day activities and decision-making processes of the Postal Service's operations and procurement management;

l. Commencing in 1985, all defendants and unindicted co-conspirators would and did (1) determine and agree that James V. Jellison, Senior Assistant PMG for operations, was an obstacle to their plan to obtain a noncompetitive MLOCR equipment production contract award to defendant REI and (2) cause, and attempt to cause, the PMG to remove Jellison from any further participation in the optical character reading equipment decision-making process;

m. Commencing in early 1985, defendants REI, MOORE and REEDY, together with all unindicted co-conspirators, would and did cause and attempt to cause USPS management to cease all activities related to the

SLOCR equipment conversion kit procurement, which was a multi-line developmental program involving awards to three of REI's competitors;

n. Commencing in early 1985, all defendants and unindicted co-conspirators would and did forward, advance and improve defendant REI's marketing position with the Postal Service by, among other things, circumventing, undermining and manipulating, and attempting to circumvent, undermine and manipulate, the USPS decision-making processes pertaining to OCR equipment in order to have the Postal Service give REI a production contract for the manufacture of MLOCR equipment and by Voss and Peterson embezzling, stealing and purloining internal confidential USPS management and Board information and documents and giving said information and documents to all defendants and unindicted co-conspirators;

o. Commencing in early 1985, all defendants and unindicted co-conspirators would and did forward, advance and improve defendant REI's marketing position with the Postal Service by, among other things, circumventing, undermining and manipulating, and attempting to circumvent, undermine and manipulate, the USPS decision-making processes pertaining to OCR equipment in order to have the Postal Service give REI a productions contract for the manufacture of MLOCR equipment and by placing, and causing to be placed, before the Board and USPS management extensive written and oral materials, statements, recommendations, questions and presentations favorable to REI's position and receipt of a noncompetitive MLOCR equipment award as the independent research, judgment, conclusions and recommendations of Voss, Governor Peters and the Technology Committee while hiding and

concealing that those materials, statements, recommendations, questions and presentations were actually authored by all defendants and Marcus with the aid of the confidential information and documents described in subparagraph "n," above;

p. Commencing in early 1985, all defendants and unindicted co-conspirators would and did cause, and attempt to cause, the USPS to move away from its ongoing automation program and established procurement procedures, to purchase, immediately and noncompetitively, defendant REI's MLOCR equipment;

q. Commencing in early 1985, Voss would and did affect, control and direct and attempt to affect, control and direct various decisions of the Board of Governors and USPS management pertaining to MLOCR equipment, including that Voss would and did encourage, recommend to and instruct high officials of the Postal Service that USPS should purchase tens of millions of dollars of MLOCR equipment from defendant REI on a noncompetitive basis;

r. In August of 1985, Voss, having failed to obtain a noncompetitive MLOCR equipment production contract for defendant REI, would and did cause, and attempt to cause, shortened test preparation period with no research and development funds for the participants in a newly announced Postal Service two-part competitive MLOCR equipment procurement, thereby benefiting REI;

s. Commencing in or about August 1985, after defendant REI agreed to participate in the two-part competitive MLOCR equipment procurement referred to in the previous subparagraph, all defendants and unindicted co-conspirators would and did agree (1) to

attempt to cause USPS to award REI a noncompetitive MLOCR equipment production contract and (2) to frustrate the two-part competitive procurement;

t. Commencing in the late summer and early fall of 1985, all defendants and unindicted co-conspirators would and did (1) determine and agree that Carlin was an obstacle to their plan to obtain a noncompetitive MLOCR equipment production contract award to defendant REI and (2) set into motion a plan to remove him from the Postal Service;

u. In late August, 1985, defendants REI and REEDY would and did meet at REI's headquarters with Gnau, Marcus, Spartin and others, to further the means, methods, objectives and purposes set forth in the preceding subparagraph, at which time Spartin would and did state (1) that he had already placed high-level officials in the Postal Service, (2) that he was in a position to influence the Board of Governor's decision to keep or replace Carlin as Postmaster General, (3) that he would be able to influence the selection of Carlin's replacement and (4) that he would be able to influence the selection and placement of other high-level officials, as part of a reorganization of upper level management, all of which would result in a friendly atmosphere for REI;

v. Contemporaneously with the events described in subparagraphs "t" and "u", above, defendant REI, by defendants MOORE and REEDY would and did agree to pay GAI, Gnau, Spartin and Marcus additional monies totalling $22,000 per month beginning in October 1985;

w. From in or about November, 1985, to in or about February, 1986, Voss would and did receive, each

month, from Gnau $2,500 in cash as payment for his efforts on behalf of defendants REI, MOORE and REEDY and all unindicted co-conspirators;

x. Commencing in October of 1985 and continuing into February 1986, Spartin would and did give Voss in excess of four thousand dollars worth of airline tickets in return for Voss' assistance in obtaining USPS placement and PMG search contracts for Spartin;

y. Commencing in mid-October until early November, 1985, defendants REI, MOORE, and REEDY would and did offer to split the two-part Competitive MLOCR equipment procurement, being sponsored by the Postal Service, with its competitor ECA, while all defendants would and did seek to undermine and circumvent the USPS' two-part competitive MLOCR equipment procurement by making unreasonable requests for proprietary data from ECA's licensor, and thereafter all defendants along with Voss, Peterson, Gnau and Marcus would and did participate in rigging separate closed presentations by REI and ECA to USPS officials and the Board's Technology Committee through the authorship of biased questions for Voss to ask ECA and REI and theft and conversion of ECA's presentation material and booklet;

z. During the fall of 1985, defendants REI, MOORE, and REEDY, along with Voss, Peterson, Gnau, Marcus and Spartin would and did continue to utilize Spartin's position at MSL International Consultants Limited to insinuate him into the confidence of high-level USPS and Board officials in order to obtain placement and management consulting contracts with the Postal Service, thereby affecting the selection, placement and termination of certain high-level Postal Service officials, including the Postmaster General,

while concealing his relationship with GAI and REI from the Postal Service;

aa. Prom November through mid-December 1985, Voss would and did obtain for Spartin USPS interim and permanent PMG search assignments, and Spartin and Gnau would and did contact defendants REI, REEDY, and MOORE, and no one else, and ask them who they wished to recommend for the position of PMG;

bb. After having been asked to recommend a PMG candidate by Gnau and Spartin, defendants REI, MOORE and REEDY, with full knowledge of Spartin's position and financial interest in GAI and its prospective one-percent contingent commission fee from REI on any contracts for OCR equipment purchased from REI by USPS, would and did recommend three individuals with whom REI, MOORE and REEDY had varying types of friendly, personal and professional relationships and whose appointment they expected would result in a more receptive environment for REI's MLOCR equipment production contract proposals;

cc. Early in January, 1986, Voss would and did recommend a candidate for the position of Postmaster General to the Board of Governors without disclosing that the candidate vas recommended to Spartin by defendants REI, MOORE, and REEDY, when they expected to benefit from a change of Postmasters General and William A. Spartin expected to benefit financially under GAI's MLOCR equipment consulting contract with REI;

dd. At the Board's January 1986 meeting, defendants REI, MOORE and REEDY and all unindicted co-conspirators would and did succeed in

removing PMG Carlin and having Albert V. Casey, one of the three individuals whom were recommended to Spartin by REI, MOORE and REEDY, sworn in as Postmaster General of the United States;

ee. Beginning in early January, 1986, Voss, by himself and through others, would and did attempt to influence PMG Casey to remove certain high-level USPS officials including Senior Assistant PMG James V. Jellison and to award to Spartin and MSL the corresponding executive replacement search contracts;

ff. Early on the morning of January 9, 1986, Spartin would and did meet with PMG Casey and receive his decision that he wanted Spartin and MSL to have the search contracts to find three replacements pertaining to the removal of Senior Assistant PMG for Operations James V. Jellison and two other Assistant PMGs;

gg. On the evening of January 9, 1986, defendants REI, MOORE and REEDY, along with Spartin and Gnau, would and did meet to celebrate having placed their candidate into the position of PMG and to discuss (1) their ongoing strategy to receive a noncompetitive MLOCR equipment contract and (2) the removal of James V. Jellison;

hh. Throughout the life of the conspiracy, defendants REI, MOORE and REEDY and the unindicted co-conspirators would and did hide, conceal and cover up from the Postal Service, the public and others the true nature and full extent of their interlocking personal, financial understandings and private business relationships, including, among other things:

(1) concealment of important marketing information, including the nature and extent of defen-

dant MOORE and REEDY's contact with Voss and GAI, from John Lawrence, MOORE's predecessor as Chairman of the Board, REI's Board of Directors, Manager of Postal Programs and consultants;

(2) concealment of the fact that United States Postal Service Governor Peter E. Voss, through his arrangement with GAI, had a significant personal, financial interest in the award by the Postal Service of a MLOCR equipment production contract to defendant REI;

(3) concealment of their participation in false introductions of each other in the presence of unknowing Postal Service officials;

(4) concealment of the fact that Voss stole, purloined and converted information and documents, from the possession of and belonging to the Postal Service, which were passed on through GAI to and for the benefit of defendants REI, MOORE and REEDY and all unindicted co-conspirators;

(5) concealment of the fact that, through Voss, all defendants and unindicted co-conspirators presented to the Board of Governors, its committees and the Postal Service, memoranda, letters, comments and questions as being the disinterested and impartial research, judgment, conclusions and recommendations of the Technology Committee when in fact these items had been written, composed and structured by all defendants and GAI;

(6) concealment of material information in statements to Inspectors of the United States Postal Inspection Service;

(7) concealment from Albert V. Casey by defendants REI and MOORE that William A. Spartin,

through his arrangement with GAI and REI, had a significant personal and financial interest in the award by the Postal Service of a MLOCR equipment production contract to defendant REI;

(8) concealment through denial, by Voss, in a closed Board of Governors meeting, in March of 1986, that he vas aware of Spartin's association with GAI;

(9) concealment through insistence, by Voss, in the same closed Board of Governors meting, that he had not had any contact with GAI since he had referred GAI to Carlin in January, 1985;

(10) concealment of Spartin's ongoing relationship with GAI by his statements to the Chairman of the Board of Governors, United States Postal Inspectors and others that he resigned from GAI on October 1, 1985;

(11) concealment of the true facts through an arrangement by defendants REI, MOORE and REEDY and Spartin to misrepresent the facts and circumstances leading up to MOORE's recommendation of Albert V. Casey to Spartin for the position of PMG; and

(12) concealment, during the period of January, 1985, to February, 1986, when Governor Peter E. Voss was acting in his official capacity for the benefit of defendant REI, that he had received approximately $19,000 in cash and more than $1,000 worth of airline tickets from REI and members of GAI and a promise of one quarter of GAI's contingent commission fee owed by REI;

ii. Defendants REI, MOORE and REEDY, and the unindicted co-conspirators, as more particularly set

forth in this subparagraph, would and did willfully and knowingly make, and cause to be made, false and fraudulent pretenses, promises and representations, well knowing that they would be and were false and fraudulent when made, including, but not limited to, the following:

(1) Defendants REI and REEDY, and Voss, Gnau and Marcus, in or about early March, 1985, within the District of Columbia, misrepresented to senior Postal Service management and Board members that Voss did not know Gnau and Marcus, when in truth and in fact, as REEDY, Voss, Gnau, and Marcus well knew, Voss did know them;

(2) Defendant REI, Voss and Marcus, in or about early May, 1985, within the District of Columbia, misrepresented to Governor Peters and others, verbally and in writing, that Voss had independently originated and written a memorandum supporting and recommending that the Postal Service immediately procure MLOCR equipment from REI on a noncompetitive basis, when, in truth and in fact, as REI, Voss, and Marcus well knew, said memorandum had been originated and written by Marcus, on behalf of defendants REI, MOORS and REEDY;

(3) Defendants REI, MOORE and REEDY, along with Voss, in or about late May 1985, misrepresented to senior Postal Service management and Board members that Voss did not know MOORE when in truth and in fact, as REI, MOORE, REEDY and Voss well knew, Voss did know MOORE;

(4) Voss, in or about June 1985, within the District of Columbia, misrepresented to the Deputy PMG that the rest of the Board of Governors supported

Voss' position that a noncompetitive award for more than $160,000,000 of MLOCR equipment should be made by the Postal Service to defendant REI, when, in truth and in fact, as Voss well knew, a majority of the Board of Governors did not support that position;

(5) Defendants REI, MOORE and REEDY, on or about November 20, 1985, misrepresented to Inspectors of the United States Postal Inspection Service that neither MOORE nor REEDY had ever met or spoken with any member of the Board of Governors on an individual basis, when in truth and in fact, as REI, MOORE and REEDY well knew, REEDY had met with Governor Voss on an individual basis and MOORE and REEDY had both spoken with Governor Voss on an individual basis;

(6) Throughout 1985 and continuing until April 8, 1986, and particularly in December of 1985, defendants REI, MOORE and REEDY and all unindicted co-conspirators misrepresented to the Board and the Postal Service, by and through omission, that Spartin had no position or financial interest in GAI, when in truth and in fact, as they all knew, Spartin was an officer of GAI with a financial interest in GAI and its contingent commission fee owed by REI;

(7) Voss, on or about March 3, 1986, within the District of Columbia, misrepresented to the Board of Governors, during an official Board of Governors meeting, that when representatives of GAI initially contacted him, he had referred them to PMG Carlin, having no contact with them thereafter, when, in truth and in fact, as Voss well knew, he had been in frequent contact with them on a continuous basis during the intervening fourteen months;

(8) Voss, on or about March 3, 1986, within the District of Columbia, misrepresented to the Board of Governors, during an official Board of Governors meeting, that he was unaware of any business relationships between Spartin and either GAI or defendant REI, when, in truth and in fact, as Voss well knew, Spartin was the president of GAI, had consulted with REI under REI's consulting contract with CAI and expected to receive an equal share of GAI's contingent commission fee owed by REI;

(9) Spartin, on or about March 3, 1986, misrepresented to the Chairman of the USPS Board of Governors that Spartin had resigned from GAI on October 1, 1985, which was prior to Spartin having received a contract from the Postal Service to search for a replacement for PMG Carlin, when, in truth and in fact, as Spartin well knew, he had not resigned from GAI prior to March 3, 1986;

(10) Defendants REI and REEDY, on or about April 8, 1986, misrepresented to Inspectors of the United States Postal Inspection Service that they had been referred to Gnau by someone other than Voss, when in truth and in fact, as REI and REEDY well knew, Voss had referred them to Gnau.

OVERT ACTS

14. Defendants RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR., and ROBERT W. REEDY, along with Peter E. Voss Sharon R. Peterson, John R. Gnau, Jr., Michael B. Marcus and William A. Spartin committed the following overt acts, among others, in furtherance of the conspiracy:

1. On or about July 6, 1984, defendants REI and MOORE had a telephone conversation with Voss in which Voss stated to REI and MOORE that Voss vas "taking heat" and "working for you."

2. On or about July 9, 1984, Sharon R. Peterson had a conversation with an employee of defendant REI in which Peterson disclosed part of the content of a closed Board session relative to an ongoing competitive procurement in which REI was a participant.

3. On or about September 3, 1984, defendants REI and REEDY met with Voss in a Dallas, Texas, restaurant at which time Voss recommended that REI hire GAI to assist REI in obtaining a MLOCR equipment production contract with the Postal Service.

4. On or about October 12, 1984, defendants REI and REEDY met with Gnau at the Dallas - Fort Worth Airport for the purpose of discussing the formation of a consulting relationship between GAI and REI.

5. On or about November 9, 1984, Gnau sent a letter to defendants REI and REEDY in which he identified Spartin to them as the President of John R. Gnau Associates, Inc.

6. On or about November 26, 1984, Voss placed a telephone call to defendants REI and MOORE in which he asked why the REI/GAI consulting arrangement had not been concluded.

7. On or about November 27, 1984, Gnau left the following telephone message for defendants REI and REEDY: "Did not go around you to WGM, resulted from Peter Voss."

8. On or about December 18, 1984, defendants REI and MOORE had a telephone conversation with Voss.

9. On or about December 20, 1984, defendants REI and MOORE sent a letter to Voss.

10. On or about January 3, 1985, defendants REI, MOORE and REEDY met with Gnau and Marcus at REI's headquarters where Gnau told REI, MOORE and REEDY that he could deliver a MLOCR equipment production award in 90 to 120 days by going through Voss and the Board of Governors.

11. On or about January 8, 1985, Voss had a conversation with PMG Carlin wherein Voss arranged for Gnau and Marcus to meet with PMG Carlin on January 11, 1985, for the purpose of discussing optical character reader equipment.

12. On or about January 10, 1985, defendants REI and REEDY sent a letter to Gnau which (1) stated REI's intention to enter into a formal agreement for marketing services with GAI, (2) authorized Gnau to represent REI at his meeting with Carlin on January 11, 1985, and (3) contained the first of three $10,000 payments, totalling $30,000, purportedly as payments for consulting fees.

13. On or about January 11, 1985, within the District of Columbia, Gnau and Marcus met with PMG Carlin to discuss optical character reading equipment, purposely not disclosing Spartin's affiliation with GAI.

14. On or about January 15, 1985, within the District of Columbia and after Voss arranged for the meeting, Spartin met with PMG Carlin and Deputy PMG Strange to discuss his executive recruiting

business, omitting any mention of his position with GAI and his relationship with defendant REI.

15. On or about January 22, 1985, Gnau sent defendants REI and MOORE a letter in which he stated he could obtain a USPS purchase order of 40 to 100 multi-line readers in 90 to 120 days from January 1, 1985.

16. On or about February 4, 1985, Marcus sent defendants REI and REEDY a letter which informed them that GAI had scheduled a meeting for REI with the Technology Committees.

17. On or about February 5, 1985, within the District of Columbia, Voss obtained a position on the Board's Technology and Development Committee.

18. On or about February 5, 1985, Gnau made the first of three equal payments to Voss totalling $9,000, through one of Voss' companies, representing Voss' share of GAI's first payment of consulting fees from defendant REI.

19. On or about February 26, 1985, defendant REI, by defendant REEDY, signed a consulting agreement back-dated to January 15, 1985, with GAI whereby GAI would assist REI in pursuing a contract with the Postal Service for the purchase of MLOCR systems from REI in return for the payment of one percent of such contract.

20. On or about March 4, 1985, defendants REI and REEDY sent the second $10,000 check to GAI in accordance with the consulting agreement dated January 15, 1985.

21. On or about March 5, 1985, within the District of Columbia, defendants REI and REEDY,

along with Gnau and Marcus (but not Spartin), met with the Technology and Development Committee.

22. On or about March 5, 1985, within the District of Columbia, just before the meeting referred to in the preceding overt act, Gnau stated to defendants REEDY and REI that there was no need to tell the attending Governors that Gnau knew Voss.

23. On or about March 5, 1985, within the District of Columbia, separate and apart from the meeting referred to in the two preceding overt acts, Gnau introduced Spartin in person in the lobby of Postal Service Headquarters to defendants REEDY and REI as GAI's "Washington associate" and "President."

24. On or about March 5, 1985, and after the events referred to in the three preceding overt acts, within the District of Columbia, Voss had a meeting with the Chairman of the Board of Governors, the result of which was that USPS management was directed to cease immediately all activities related to the conversion kit procurement which was a multiline developmental program involving awards to three of defendant REI's competitors.

25. On or about March 11, 1985, defendants REI and REEDY sent a letter to Gnau expanding the coverage of the REI/GAI consulting agreement, dated January 15, 1985, to include any contract awarded by the Postal Service to REI for multi-line adapter kits for SLOCR equipment.

26. On or about March 12, 1985, Gnau made the second $3,000 payment to Voss through Sharon Peterson, representing Voss' share of GAI's second payment of consulting fees from defendant REI.

27. On or about March 27, 1985, within the District of Columbia, defendants REI, MOORE and REEDY had a meeting with Spartin in which Spartin told them that he and Gnau were well connected with Voss.

28. On or about March 29, 1985, defendants REI and REEDY sent the third $10,000 payment to GAI in accordance with the consulting agreement dated January 15, 1985.

29. Between on or about April 15, 1985 and on or about April 29, 1985, Marcus, on behalf of all defendants and unindicted co-conspirators, wrote a memorandum entitled "Memorandum Re: Recommendations to Management—Implementation of Zip + 4," for Voss' submission to USPS Management and the Board, purporting to be the independent research, judgment, conclusions and recommendations of the Technology Committee, but which in fact included the input, conclusions and recommendations developed by REI, MOORE and REEDY to support REI's proposal to sell MLOCR equipment to the USPS, without any reference to all defendants and Marcus' preparation and authorship of the memorandum.

30. Between on or about April 23, 1985, and on or about April 29, 1985, Marcus showed an employee of defendant REI the memorandum referred to in the preceding overt act and a cover letter to Governor Peters, prepared by Marcus, which misrepresented to Governor Peters that Voss had written the cover letter and that Voss had independently originated the memorandum and the recommendations to Postal Service management contained therein.

31. Between on or about April 23, 1985 and on or about April 29, 1985, Marcus told defendant REI about the receipt and content of an internal USPS management memorandum by Deputy PMG Strange entitled "Memorandum for Technology and Development Committee."

32. Between on or about April 23, 1985, and on or about April 29, 1985, and after the act referred to in the preceding overt act, defendant REI told Marcus information for Voss to use in making a response to Deputy PMG Strange's April 23, 1985, memorandum.

33. On or about April 29, 1985, Marcus sent Voss the cover letter for Governor Peters, referred to in overt act number 30, and the memorandum entitled "Memorandum Re: Recommendations to Management—Implementation of Zip + 4" along with a document entitled "Response to Deputy PMG Strange" for submission by Voss to Governor Peters and ultimately to USPS management and the Board of Governors as the independent research, judgment, conclusions and recommendations of the Technology Committee of the Board of Governors without any reference to all defendants and Marcus' preparation and authorship of the documents.

34. On or about May 6, 1985, within the District of Columbia, Voss, through Governor Peters and the Technology Committee, gave the "Memorandum" and "Response" referred to in the preceding overt act to the Board and Postal Service management without any reference to all defendants and Marcus' preparation and authorship of the documents and recommendations contained therein.

35. On or about May 10, 1985, Gnau made the third $3,000 payment to Voss through his company, Decision Systems, Inc., representing Voss' share of GAI's third payment of consulting fees from defendant REI.

36. On or about May 23, 1985, during an official meeting of the Board's Technology and Development Committee with defendants REI and REEDY at Dallas, Texas, Voss, in Gnau's presence, told Postal Service officials that he did not know Gnau.

37. On or about May 24, 1985, during an official meeting of the Board's Technology and Development Committee, at defendant REI's headquarters, when introduced to defendant MOORE by defendant REEDY in the presence of Postal Service officials, Voss said that he had never heard of MOORE.

38. On or about May 24, 1985, after the official meeting of the Board's Technology and Development Committee, defendants REI and REEDY asked Gnau in substance, "What's your arrangement with Voss?"

39. On or about May 24, 1985, in response to the question referred to in the preceding overt act, Gnau stated in substance to defendants REI and REEDY, "It is better you not know what my arrangement with Voss is."

40. On or about June 14, 1985, within the District of Columbia, Voss had a conversation with Deputy PMG Strange in which he told her to award defendant REI a noncompetitive contract for the production of 90 multi-line readers for an aggregate price of approximately $162 million and that such an award was supported by the full Board of Governors.

41. On or about July 8, 1985, Marcus had a conversation with Governor Peters in which he recommended to her that the Board of Governors seek the guidance of an independent government procurement specialist, without disclosing to her that the individual vas a consultant to defendant REI.

42. On or about July 8, 1985, within the District of Columbia, Voss had a conversation with PMG Carlin in which he told Carlin to fire Senior Assistant PMG Jellison.

43. On or about July 10, 1985, within the District of Columbia, defendant REEDY and Marcus met with an employee of defendant REI when the employee was told to deliver an envelope containing REI MLOCR equipment technical material to the Board of Governors office.

44. In or about mid-July, 1985, defendants REI and REEDY and Marcus had a conversation in which REEDY said in substance, "Why don't you get Peter Voss to order sole source."

45. On or about July 10, 1985, defendant MOORE had a conversation with an individual whose identity is unknown to the Grand jury in which MOORE was told, in part, of the content and results of the closed Board of Governors meeting end contemporaneous USPS management personnel deliberations which occurred on or about July 8, 1985.

46. On or about August 5, 1985, at an official Board of Governors meeting, Voss told Postal Service management, after it had decided to commence a two-part competitive MLOCR equipment procurement, to have a shortened test preparation period for that procurement.

47. Between on or about August 5, 1985, and on or about August 9, 1985, defendants REI and REEDY had a conversation with Marcus in which Marcus relayed confidential information received from Voss which was taken from the discussions which occurred in an August 5, 1985 closed Board of Governors meeting.

48. On or about August 9, 1985, defendants REI and MOORE had a conversation with a person whose identity is unknown to the Grand Jury in which he learned about the discussions in the closed Board of Governors meeting on August 5, 1985.

49. In or about late August, 1985, and before the events referred to in the next three overt acts, defendants REI and REEDY asked Spartin whether he individually was being paid relative to the REI/GAI agreement, being told in Spartin's answer that Spartin planned on sharing in the one percent contingent commission fee from REI.

50. On or about August 29, 1985, defendants REI and REEDY and other REI officers and employees met at REI's headquarters with Spartin, Gnau and Marcus for the purpose of discussing the strategy to obtain a noncompetitive MLOCR equipment production contract.

51. On or about August 29, 1985, defendants REEDY and REI had a conversation with Spartin, Gnau and Marcus in which they discussed (a) the replacement of senior Postal Service officials including the removal of PMG Carlin and Senior Assistant PMG Jellison both of whom they had concluded were obstacles to REI's receipt of a noncompetitive Postal Service MLOCR equipment

production contract and (b) the payment to GAI of additional consulting fees from REI, resulting in two agreements providing for additional consulting fees of $22,000 per month.

52. On or about August 29, 1985, defendants REI and REEDY and Marcus and Gnau had a private conversation relating to REEDY's approval of two new consulting agreements with GAI, carrying total compensation of $22,000 per month, in which REI and REEDY said in substance "I know you have people to take care of."

53. On or about September 5, 1985, within the District of Columbia, Voss read to a closed Board of Governors meeting from a memorandum, written by Marcus, without reference to Marcus, GAI or defendant REI, to rebut USPS management's competitive MLOCR equipment program, recommending changes advantageous to REI, including a proposed joint Audit/ Technology Committee meeting.

54. On or about September 26, 1985, defendant REEDY, as authorized by defendant MOORE, on behalf of defendant REI, signed an addendum to the REI/GAI consulting agreement dated January 1S, 1985, providing for a $16,000 per month nonrefundable advance against the one percent contingent commission fee along with also signing a new consulting agreement with GAI for $6,000 per month purportedly for public relations activities.

55. On or before September 30, 1985, with the assistance of defendant REI, Marcus wrote a memorandum entitled "Statement of the Technology Committee Zip + 4 Automation Program" which recommended the immediate noncompetitive procurement of

MLOCR equipment from REI and which Voss used to influence a joint meeting of the Board's Audit and Technology Committees.

56. On or about October 3, 1985, defendant MOORE had a conversation with a person whose identity is unknown to the Grand Jury, in which he learned about the discussions in the closed joint meeting of the Board's Audit and Technology Committees on September 30, 1985.

57. On or about October 11, 1985, defendant REI issued the first of ten monthly $22,000 checks to GAI in accordance with REI's two consulting contracts with GAI.

58. Between on or about October 11, 1985, and on or about October 17, 1985, defendant MOORE had a conversation with one or more employees of defendant REI in which MOORE directed that REI, through excessive requests for proprietary information, should make ECA, its only competitor on the USPS MLOCR equipment procurement, appear to the Postal Service to be uncooperative and thereby cause, and attempt to cause, the Postal Service to make a noncompetitive award to REI and abandon the competitive program in which REI had agreed to participate.

59. On or about October 17, 1985, at defendant REI's headquarters, defendants REI, MOORE and REEDY met with representatives of ECA'S licensor, for the purposes described in the previous overt act, with MOORE suggesting to said representatives that REI and ECA split the ongoing two-part MLOCR equipment procurement.

60. On or about October 18, 1985, Spartin gave Voss the first of nineteen airline tickets, having a

total value in excess of $4,000, in return for Voss' official influence to assist Spartin in obtaining official executive recruitment contracts with the Postal Service.

61. On or about October 25, 1985, with the assistance of defendant REI, Marcus wrote a memorandum which recommended the immediate test of MLOCR equipment followed quickly by the procurement of MLOCR equipment from REI and which was used by Voss and the Technology Committee to respond to PMG Carlin's October 18, 1985 letter addressed to the Chairman of the Board's Audit Committee which detailed the benefits of competition to the Postal Service in the ongoing two-part MLOCR equipment procurement.

62. On or about October 26, 1985, Spartin and Marcus had a telephone conversation in which they discussed in substance that, with Voss' assistance, all defendants and unindicted co-conspirators would succeed in removing Carlin as Postmaster General and replacing Carlin and other USPS managers with new individuals who would favor defendant REI.

63. On or about October 31, 1985, in Dallas Texas, defendants REI and REEDY met with Marcus for the purpose of drafting questions to be given to and used by Voss when REI and ECA made separate presentations on November 4, 1985, to the Technology Committee and selected Postal Service procurement officials on the competitive status of the two participating vendors in the ongoing MLOCR equipment procurement.

64. On or about November 1, 1985, within the District Of Columbia, after ECA's status presenta-

tion and before defendant REI's status presentation, Voss took information and written materials from ECA's presentation, thereafter unlawfully giving them to Marcus for defendants REI, MOORE and REEDY.

65. On or about November 1, 1985, within the District of Columbia, incident to the event referred to in the preceding overt act, Voss told a USPS contracting officer to introduce him to defendants MOORE and REEDY and Gnau.

66. On or about November 1, 1985, and soon after the events referred to in the two previous overt acts, within the District of Columbia, defendants REI, MOORE and REEDY physically received from Marcus the written materials which Marcus had received from Voss after ECA's status presentation.

67. On or about November 11, 1985, Gnau handed the first of four $2,500 cash payments to Voss in payment for his official influence and acts favorable to defendant REI pertaining to the ongoing procurement of MLOCR equipment by the Postal Service.

68. On or about November 20, 1985, at defendant REI's headquarters, defendant REEDY, in the presence of defendant MOORE and another REI employee, when asked by a United States Postal Inspector whether any of them had met with or spoken to any member of the United States Postal Service Board of Governors on an individual basis, stated that they had not.

69. On or about December 2, 1985, within the District of Columbia, at an official Board of Governors meeting, Voss told the other Governors that PMG Carlin should be replaced.

70. In or about early December, 1985, and after the event referred to in the previous overt act, within the District of Columbia, Voss, with the consent of the Chairman of the Board of Governors, authorized Spartin to begin an official search for a candidate to replace PMG Carlin.

71. In or about early December 1985, and after the event referred to in the previous overt act, within the District of Columbia, Gnau and defendant REEDY had a conversation in which Gnau told REEDY that Spartin had the assignment to find a candidate to replace PMG Carlin and that Spartin and Gnau believed that defendants REI, MOORE and REEDY should make the decision on the individual to be recommended by Spartin to the Board of Governors.

72. On or about December 11, 1985, defendant MOORE made a statement to Spartin that MOORE's choice for PMG was Albert V. Casey, a personal acquaintance of MOORE's and a close friend and long-time business associate of one of the members of defendant REI's Board of Directors.

73. On or about December 11, 1985, defendant MOORE, after the statement referred to in the previous overt act and after Spartin asked for more than just one name, told Spartin the names of two other individuals personally acquainted with defendant REI and/or MOORE.

74. On or about December 11, 1985, defendant MOORE placed a telephone call to Albert V. Casey in which MOORE asked Casey if Casey would be interested in holding the position of Postmaster General without disclosing that the Postal Service executive recruiter was a consultant for defendant REI.

75. On or about December 12, 1985, defendant MOORE placed a telephone call to Spartin in the District of Columbia in which MOORE told Spartin that MOORE had arranged with Albert V. Casey, who had told MOORE he was interested in becoming PMG, for Spartin to make personal contact with Albert V. Casey.

76. On or about December 13, 1985, within the District of Columbia, Spartin sent a letter contract, formalizing Spartin's search contract for an interim PMG and signed by Spartin, to the Secretary for the Board of Governors.

77. On or about December 16, 1985, within the District of Columbia, Spartin sent a letter contract, formalizing Spartin's search contract for a permanent PMG and signed by Spartin, to the Secretary for the Board of Governors.

78. On or about December 16, 1985, Gnau handed the second of four $2,500 cash payments to Voss in payment for his official influence and acts favorable to defendant REI pertaining to the ongoing procurement of MLOCR equipment by the Postal Service.

79. On or about January 6, 1986, within the District of Columbia, Voss went to an official Board of Governors meeting at which he voted (1) to remove Carlin and (2) to select Albert V. Casey, whom he knew was recommended by defendant REI, to be the Postmaster General of the United States.

80. On or about January 7, 1986, within the District of Columbia, Voss told PMG Casey (1) that he should replace one or more senior USPS officials, including Senior Assistant PMG Jellison, and (2) that Casey should hire Spartin and his firm, MSL, to conduct the search for their replacements.

81. On or about January 9, 1986, at about 8:00 a.m., within the District of Columbia, Spartin met with PMG Casey who told Spartin that Casey wanted Spartin and MSL to have the search contracts to find three replacements pertaining to the removal of Senior Assistant PMG for Operations James V. Jellison and two other Assistant Postmasters General.

82. On or about the evening of January 9, 1986, within the District of Columbia, defendants REI, MOORE and REEDY met with Gnau and Spartin and others at which time they (1) celebrated their candidate becoming Postmaster General, (2) developed a strategy, based on their belief that the selection and appointment of Albert V. Casey as PMG was advantageous for REI, to obtain a noncompetitive MLOCR equipment production contract for REI as soon as possible and (3) discussed the removal of Jellison.

83. On or about January 25, 1986, Gnau sent the third of four $2,500 cash payments to Voss in payment for his official influence and acts favorable to defendant REI pertaining to the ongoing procurement of MLOCR equipment by the Postal Service.

84. On or about January 31, 1986, within the District of Columbia, defendants REI and REEDY had a meeting with Spartin at which they discussed their goal of circumventing the competitive MLOCR equipment procurement program at the Postal Service and Spartin's recent assignments to identify three Assistant PMG candidates.

85. On or about February 24, 1986, Gnau sent the fourth $2,500 cash payment to Voss in payment for his official influence and acts favorable to defendant

REI pertaining to the ongoing procurement of MLOCR equipment by the Postal Service.

86. On or about February 26, 1986, within the District of Columbia, defendants REI, MOORE and REEDY met with Jellison's replacement.

87. On or about February 26, 1986, within the District of Columbia, defendants REI, MOORE and REEDY had a meeting with Spartin wherein MOORE complained that nothing was getting done and Spartin replied that PMG Carlin had been destroyed as planned.

88. On or about March 3, 1986, within the District of Columbia, Voss stated to the Board of Governors, during an official Board of Governors meeting, that when representatives of GAI initially contacted him he had referred them to PMG Carlin, having no contact with them thereafter.

89. On or about March 3, 1986, within the District of Columbia, Voss stated to the Board of Governors, during an official Board of Governors meeting, that he was unaware of any business relationship between Spartin and either GAI or defendant REI.

90. On or about March 1, 1986, within the District of Columbia, defendants REI and REEDY had a telephone conversation with Spartin in which Spartin stated that the Chairman of the Board of Governors had terminated his contract to identify a permanent Postmaster General to succeed Albert V. Casey and that Spartan had prepared a backdated letter which said that Spartin had resigned from GAI on October 1, 1985.

91. On or about March 21, 1986, defendants REI and REEDY had a telephone conversation with Spartin in which Spartin told REEDY that he was

interviewed by United States Postal Inspectors relative to his prior contract to identify an interim postmaster General and his affiliation with GAI, that he told the Inspectors that he resigned from GAI on October 1, 1985, and that he gave them false information pertaining to his recommendation of Albert V. Casey for PMG.

92. In or about March 1986, defendant MOORE and Spartin had a conversation in which MOORE agreed to misrepresent that MOORE had contacted Spartin to make suggestions for a PMG candidate, instead of the fact that Gnau and Spartin had contacted defendants REI, REEDY and MOORE to obtain their choice for a PMG candidate.

93. On or about March 28, 1986, Spartin had a conversation with Marcus in which he asked Marcus to participate in a cover-up story that had been communicated to defendants REI, MOORE and REEDY.

94. On or about March 31, 1986, Voss placed in the United States mails an envelope which, among other documents, contained a letter contract proposed by REI for the Postal Service to purchase MLOCR systems.

95. On or about April 8, 1986, defendant REEDY, when asked by United States Postal Inspectors how defendant REI had come in contact with Gnau, made a statement in which he misrepresented, first, that he could not recall and, second, that another of REI's consultants had given Gnau's name to REEDY in the summer of 1984.

96. On or about October 1, 1986, defendant REI sent to GAI a check for $8,000 as the final payment on its two consulting agreements with GAI, raising the

total paid on those two contracts to an amount in excess of $295,000.

(Violation, Title 18 U.S. Code, Section 371)

COUNT TWO

1. The allegations contained in paragraphs one through eleven of Count one of this Indictment are realleged and incorporated herein by reference as though fully set forth in this Count of this Indictment.

2. On or about November 4, 1985, within the District of Columbia, defendants RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR., and ROBERT W. REEDY did steal, purloin, and embezzle property with a value in excess of $100, used by the Postal Service, that is, a booklet entitled "Presentation To Members Of The Board of Governors And Management Of The USPS," property of ElectroCom Automation, Inc., a body corporate, and appropriate such property to their own use and other than its proper use.

(Violation, Title 18 U.S. Code, Sections 1707 and 2)

COUNT THREE

1. The allegations contained in paragraphs one through eleven of Count One of this Indictment are realleged and incorporated herein by reference as though fully set forth in this Count of this Indictment.

2. On or about November 4, 1985, within the District of Columbia, defendants RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR. and ROBERT W. REEDY received, possessed, and obtained control of property of a value of $250 or more, belonging to ElectroCom Automation, Inc., a body

corporate, in the care, custody, control and possession of the United States Postal Service, consisting of a booklet entitled "Presentation To Members of The Board Of Governors And Management Of The USPS," which had been stolen, knowing and having cause to believe that it was stolen, with the intent to defraud and to deprive ElectroCom Automation, Inc., and the United States Postal Service of the right to and benefit of the property.

(Violation, Title 22 D.C. Code, Sections 3832(a), 3832(c)(1), 105)

COUNT FOUR

1. The allegations contained in paragraphs one through eleven of Count One of this Indictment are realleged and incorporated herein by reference as though fully set forth in this Count of this Indictment.

2. From in or about July, 1984, the exact date being unknown to the Grand Jury, to on or about October 1, 1986, defendants RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR. and ROBERT W. REEDY, together with Peter E. Voss, Sharon R. Peterson, John R. Gnau, Jr., Michael B. Marcus and William A. Spartin, within the District of Columbia and elsewhere, willfully, knowingly and unlawfully devised and intended to devise a scheme and artifice to defraud the United States Postal Service and REI's competitors and potential competitors for Postal Service optical character reading equipment contracts, and for the purpose of obtaining money and property by means of false and fraudulent pretenses, promises and representations which defendants RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR. and ROBERT W. REEDY, together with Peter E.

Voss, Sharon R. Peterson, John R. Gnau, Jr., Michael B. Marcus and William Spartin, well knew would be and were false when made, which scheme and artifice is more fully described in the allegations contained in paragraph Thirteen of Count One of this Indictment which are realleged and incorporated herein by reference as though fully set forth in this Count of this Indictment.

3. On or about November 15, 1985, within the District of Columbia, defendants RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR. and ROBERT W. REEDY, together with Peter E. Voss, Sharon R. Peterson, John R. Gnau, Jr., Michael B. Marcus and William A. Spartin, for the purpose of executing the aforesaid scheme and artifice and attempting so to do, placed and caused to be placed in a post office and authorized depository for mail matter an envelope, containing documents which are described in the column marked "CONTENTS," to be sent and delivered by the Postal Service from the person identified in the column marked "SENDER" to the person identified in the column marked "ADDRESSEE":

SENDER	ADDRESSEE	CONTENTS
David P. Harris Secretary, Board of Governors Room 10300 U.S. Postal Service Washington, D.C. 20260-1000	William Sullivan 154 Leighton Bangor, ME 04401	Memorandum for the Board of Governors along with transcripts of REI and ECA's presentations to the Technology and Development Cmmittee and selected Postal Service officials.

(Violation, Title 18 U.S. Code, Sections 1341, 2)

COUNTS FIVE AND SIX

1. The allegations contained in paragraphs one through eleven of Count One of this Indictment are realleged and incorporated herein by reference as though fully set forth in these Counts of this Indictment.

2. From in or about July, 1984, the exact date being unknown to the Grand Jury, to on or about October 1, 1986, defendants RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR., and ROBERT W. REEDY, together with Peter E. Voss, Sharon R. Peterson, John R. Gnau, Jr., Michael B. Marcus and William A. Spartin, within the District of Columbia and elsewhere, willfully, knowingly and unlawfully devised and intended to devise a scheme and artifice to defraud the United States Postal Service and REI's competitors and potential competitors for Postal Service optical character reading equipment contracts, and for the purpose of obtaining money and property by means of false and fraudulent pretenses, promises and representations which defendants RECOGNITION

EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR., and ROBERT W. REEDY, together with Peter E. Voss, Sharon R. Peterson, John R. Gnau, Jr., Michael B. Marcus and William A. Spartin, well knew would be and were false when made, which scheme and artifice is more fully described in the allegations contained in paragraph Thirteen of Count One of this Indictment which are realleged and incorporated herein by reference as though fully set forth in these Counts of this Indictment.

3. On or about the date for each Count listed below in the column marked "DATE," defendants RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORED JR., and ROBERT W. REEDY, together with Peter E. Voss, Sharon R. Peterson, John R. Gnau, Jr., Michael B. Marcus and William A. Spartin, for the purpose of executing the aforesaid scheme and artifice did transmit and cause to be transmitted, in interstate commerce by means of wire communications, signals and sounds, that is, telephone conversations from the persons at the locations the column marked "FROM" to the person at the below in the column marked "TO":

COUNT	DATE	FROM	TO
FIVE	December 12, 1985	Defendant WILLIAM G. MOORE, JR., at defendant REI's headquarters, Dallas, Texas	William A. Spartin, Washington, D.C.
SIX	March 4, 1986	Defendant ROBERT W. REEDY at defendant REI's headquarters, Dallas, Texas	William A. Spartin, Washington, D.C.

(Violation, Title 18 U.S. Code, Sections 1343, 2)

COUNT SEVEN

1. The allegations contained in paragraph one through eleven of Count One of this Indictment are realleged and incorporated herein by reference as though fully set forth in this Count of this Indictment.

2. From in or about July, 1984, the exact date being unknown to the Grand Jury, to on or about October 1, 1986, defendants RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR. and ROBERT W. REEDY, together with Peter E. Voss, Sharon R. Peterson, John R. Gnau, Jr., Michael B. Marcus and William A. Spartin, within the District of Columbia and elsewhere, willfully, knowingly and unlawfully devised and intended to devise a scheme and artifice to defraud the United State Postal Service and

REI's competitors and potential competitors for Postal Service optical character reading equipment contracts, and for the purpose of obtaining money and property by means of false and fraudulent pretenses, promises and representations which defendants RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR. and ROBERT W. REEDY, together with Peter E. Voss, Sharon R. Peterson, John R. Gnau, Jr., Michael B. Marcus and Willilliam A. Spartin, well knew would be and were false when made, which scheme and artifice is more fully described in the allegations contained in paragraph Thirteen of Count One of this Indictment which are realleged and incorporated herein by reference as though fully set forth in this count of this Indictment.

3. On or about March 31, 1986, within the District of Columbia, defendants RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR. and ROBERT W. REEDY, together with Peter E. Voss, Sharon R. Peterson, John R. Gnau, Jr., Michael B. Marcus and William A. Spartin, for the purpose of executing the aforesaid scheme and artifice and attempting so to do, knowingly caused to be delivered by mail according to the direction thereon an envelope, containing documents which are described in the column marked "CONTENTS," to be sent and delivered by the Postal Service from the person identified in the column marked "SENDER'"to the person identified in the column marked "ADDRESSEE":

SENDER	ADDRESSEE	CONTENTS
Peter E. Voss Canton, OH	David Harris Secretary U.S.P.S. Headquarters, Suite 10300, 475 L'Enfant Plaza S.W., Washington, D.C. 20260	Transmittal letter from John R. Gnau, Jr., addressed to Peter Voss with attachments that included a March 20, 1986 letter from defendant ROBERT W. REEDY to SAPMG Coughlin and a proposed letter contract for the purchase of MLOCR systems from defendant REI.

(Violation, Title 18 U.S. Code, Sections 1341, 2)

A TRUE BILL:

_____

FOREPERSON

[Signature Illegible]

ATTORNEY OF THE UNITED STATES IN
AND FOR THE DISTRICT OF COLUMBIA

Supreme Court, U.S.
FILED
AUG 26 2005
OFFICE OF THE CLERK

No. 04-1495

In the Supreme Court of the United States

MICHAEL HARTMAN, ET AL., PETITIONERS

v.

WILLIAM G. MOORE, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether law enforcement agents may be liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for retaliatory prosecution in violation of the First Amendment when the prosecution was supported by probable cause.

PARTIES TO THE PROCEEDINGS

Petitioners are Michael Hartman, Frank Kormann, Pierce McIntosh, Norman Robbins, and Robert Edwards. Respondent is William G. Moore, Jr.

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In the Supreme Court of the United States

No. 04-1495

MICHAEL HARTMAN, ET AL., PETITIONERS

v.

WILLIAM G. MOORE, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 388 F.3d 871. The order of the district court (Pet. App. 42a) is unreported. Prior opinions of the court of appeals (Pet. App. 43a-58a, 112a-128a) are reported at 213 F.3d 705 and 65 F.3d 189. The prior opinion of the district court dated September 24, 1993 (Pet. App. 129a-149a) is not published in the *Federal Supplement* but is *available at* 1993 WL 405785. The other prior district court orders and opinions (Pet. App. 59a-111a, 150a-151a, 152a-165a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2004. A petition for rehearing was denied on January 31, 2005 (Pet. App. 166a). On April 22, 2005,

the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 9, 2005. The petition was filed on that date, and was granted on June 27, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT

1. An investigation of public corruption in the procurement of equipment by the United States Postal Service (Postal Service) resulted in the successful prosecution of a member of the Postal Service's Board of Governors and a number of consultants. Respondent, the president of a company that hired the consultants on the recommendation of the corrupt member of the Board of Governors, was indicted and then acquitted. In this *Bivens* action, see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), respondent alleges that United States Postal Inspectors targeted him in retaliation for his criticism of the Postal Service and for his lobbying activities.

a. In the mid-1980s, respondent was president and chief executive officer of Recognition Equipment, Inc. (REI), which was engaged in an effort to market "multi-line" optical character readers (OCRs) to the Postal Service. OCRs, which can interpret text on an envelope, are used to sort mail. After the Postal Service decided to purchase "single-line" OCRs, respondent and REI mounted a media and lobbying campaign that sought to

overturn the decision.[1] When the Postal Service changed course and decided to purchase multi-line OCRs instead, respondent campaigned for the award of "sole source" contracts (*i.e.*, contracts without competitive bidding) to REI. The total value of the contracts sought by REI was between $250 and $400 million. Pet. App. 2a-4a; J.A. 56, 68.

In September 1984, Robert Reedy, REI's Vice President for Marketing, met with Peter E. Voss, a member of the Board of Governors of the Postal Service. Voss recommended that REI hire John Gnau and his consulting firm, Gnau and Associates, Inc. (GAI), to assist in REI's efforts to obtain Postal Service contracts. In January 1985, REI acted on Voss's recommendation, and hired GAI as a consultant. J.A. 54-55, 79.

As it turned out, Voss had a substantial financial interest in ensuring that Gnau got consulting work, because the two had agreed that Voss would refer clients to Gnau's firm in exchange for a kickback of a portion of GAI's fees. They had also agreed that Voss, Gnau, and two other GAI officers—William Spartin and Michael Marcus—would split the contingency fee that REI undertook to pay GAI if REI obtained the Postal Service contract. Pet. App. 4a, 44a, 113a.

United States Postal Inspectors ultimately discovered the kickback scheme. They also discovered a related scheme, which involved the search for a new Postmaster General in 1985. Spartin, the nominal president of GAI, headed an executive recruiting firm called MSL

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[1] Because single-line OCRs read only the last line of an address, their effectiveness is largely dependent on the use of nine-digit zip codes. That is not true of multi-line OCRs, which read the entire address and then convert the information into a bar code that corresponds to the nine-digit zip code. J.A. 78, 112.

International (MSL). Through Voss, and despite GAI's representation of REI before the Postal Service, Spartin's firm received the contract to find a new Postmaster General. Spartin sought to conceal his conflict of interest from the Postal Service. J.A. 58-59, 85.

After MSL received the contract, Spartin called respondent and asked for recommendations. Respondent gave Spartin the names of three prominent business executives, including Albert V. Casey, who was ultimately selected as Postmaster General. Respondent also made an introductory call to Casey on Spartin's behalf. J.A. 59, 85.

The postal inspectors' investigation resulted in federal criminal charges against Voss, Gnau, and Marcus, all of whom pleaded guilty. Spartin was given immunity in exchange for his cooperation. Pet. App. 4a.

b. As the investigation continued, the postal inspectors determined that respondent and Reedy must have known about the criminal schemes from which they stood to benefit. Although neither Voss nor any of the GAI defendants admitted that they had told respondent or Reedy about the illegal arrangement between Voss and Gnau, there was considerable circumstantial evidence that respondent and Reedy had been aware of both schemes and had used them to their company's advantage. For example:

- When Voss recommended that REI hire GAI, Voss told Reedy that he was capable of making the proper presentation to the Board of Governors on REI's behalf, but could not do so because he was a member of the Board. Voss made several follow-up calls about GAI and, on at least one occasion, asked respondent why his recommenda-

tion had not been acted upon. Respondent "kept pushing" Reedy, and told him not to "drop the ball" with respect to the referral. J.A. 54-55, 79-80; C.A. App. 414.

- Respondent's notes dated December 18, 1984, say "Get John Knau [sic] involved have broad scale association with John—get together." Respondent's notes also reflect what appears to be information, set out under the heading "Closed Session," from closed sessions of the Postal Service's Board of Governors, of which Voss was a member. And respondent's notes of April 29, 1985, contain the cryptic entry "Consultant—wired (Peter Voss)." J.A. 41, 55-56, 82, 126.
- Gnau informed the postal inspectors that Reedy had once asked what his arrangement was with Voss and that Gnau had responded, "[i]t's better you not know." Gnau also told the postal inspectors that he had suggested to Reedy that they refer to Voss as "our friend," and that Reedy had said, "I understand." In addition, Gnau said that, when discussing REI's payments to GAI, Reedy had told Gnau, "I know you have people to take care of," and that Gnau had understood Reedy to be referring to Voss. J.A. 57.
- Reedy lied to the postal inspectors about prior contacts with Voss. When asked who had recommended GAI to him, Reedy said that he had gotten Gnau's name from a consultant during a chance encounter at the 1984 Republican National Convention. Reedy later admitted that he had received the referral from Voss. J.A. 81.

- GAI's Michael Marcus recounted a conversation in which Spartin indicated that REI had purged records relating to the investigation, and there were in fact a number of omissions in the records that REI produced in response to a subpoena. Respondent's "Postal" notebook appeared to be missing 36 sheets of paper; there were no entries in the notebook for a six-month period in 1986; and respondent's telephone log for a three-month period in 1984-1985 was never located. In addition, an REI employee named Frank Bray admitted that he had altered his travel records to conceal meetings with Spartin. J.A. 60-61, 82, 85, 172-173.
- One of respondent's notebooks included an entry suggesting that he might have coached REI employees on how to answer questions from postal inspectors,[2] and REI employees subsequently testified before the grand jury that respondent had made comments consistent with that entry at a staff meeting the day the entry was made. By

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[2] The entry, dated January 27, 1987, reads as follows:

- lot of homework
- drive a wedge between people (intimidate)
- answer "I don't know, I really can't remember"
- excitable
- all kinds of scenarios
- ask same questions over and over
- don't show him how smart you are
- don't relax
- long interrogation (tough questions at end)
- possible subpoena

Pet. App. 23a-24a.

that time, postal inspectors had arranged to interview REI employees in the coming week. J.A. 61-62, 89-90.

- The postal inspectors found respondent's explanation of his involvement in Spartin's recruitment of a new Postmaster General implausible. Respondent told them that, when Spartin called and asked for referrals, he did not really believe that Spartin was recruiting a Postmaster General. That seemed implausible because respondent not only gave Spartin the names of candidates, but made an introductory telephone call to one of them. The inspectors were also informed by Spartin that he and respondent had agreed to say that it was respondent who called Spartin, even though it was in fact Spartin who placed the call. J.A. 59, 85-86.

After considerable deliberation, including 24 separate meetings during a seven-month period, the United States Attorney for the District of Columbia decided to seek an indictment of respondent, Reedy, and REI. In October 1988, a grand jury returned a seven-count indictment charging them with conspiracy to defraud the United States, in violation of 18 U.S.C. 371; mail and wire fraud, in violation of 18 U.S.C. 1341, 1343, and 2; theft of property used by the Postal Service, in violation of 18 U.S.C. 1707 and 2; and receiving stolen property, in violation of District of Columbia law. The indictment alleged that respondent and Reedy participated in the kickback scheme and the scheme involving the search for a Postmaster General. The lead prosecutor in the case was Assistant United States Attorney (AUSA) Jo-

seph Valder. Pet. App. 4a-5a, 130a-132a; J.A. 108-109, 474-525.[3]

Respondent, Reedy, and REI pleaded not guilty to the charges, and proceeded to trial. At the close of the government's case, the district court granted the defendants' motion for judgment of acquittal, finding the evidence insufficient to support a reasonable inference that they knew of either criminal scheme. *United States* v. *Recognition Equip. Inc.*, 725 F. Supp. 587 (D.D.C. 1989).

c. Respondent thereafter brought this *Bivens* action in the United States District Court for the Northern District of Texas, where respondent resided. The defendants in the civil case were AUSA Valder and six postal inspectors—petitioners and a postal inspector who has since died—who had worked on the investigation and prosecution. Respondent alleged a number of constitutional violations, including malicious prosecution and retaliatory prosecution in violation of the First Amendment. The theory of the complaint was that respondent was prosecuted in retaliation for his criticism of Postal Service policy concerning OCR technology. Respondent later filed a separate suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671-2680. Pet. App. 5a-6a, 46a, 113a-115a.

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[3] Although REI had lobbied for the award of "sole source" contracts for multi-line OCRs, the Postal Service decided to conduct a competitive procurement. After it was indicted, REI submitted a bid with Unisys Corporation (Unisys), but did not receive the contract. In rejecting Unisys's challenge to the award of the contract to its competitor, the United States District Court for the District of Delaware concluded that "the REI machine performed so poorly in relation to the [competitor's] machine" that "Unisys would have had to lower its original bid from $233.6 million to $3,805,585 in order to win the contract." J.A. 62 (quoting *Unisys Corp.* v. *USPS*, Civ. No. 89-331 LON, (D. Del. Aug. 4, 1989), slip op. at 22).

2. a. The district court dismissed all claims against Valder on the ground of absolute immunity and dismissed all claims against the postal inspectors, except the claims of malicious prosecution and retaliatory prosecution, on the ground of qualified immunity. The court then ruled that it lacked personal jurisdiction over the postal inspectors and transferred the case to the United States District Court for the District of Columbia. It also transferred the FTCA case. Pet. App. 152a-165a.

After the transfer, the cases were consolidated. The district court then dismissed respondent's claims of malicious prosecution and retaliatory prosecution, holding that the allegations did not satisfy the heightened pleading standard under then-applicable circuit law for *Bivens* claims asserting an unconstitutional motive. The court also dismissed the FTCA claims. Pet. App. 129a-151a.

b. Respondent appealed, and the court of appeals affirmed in part and reversed in part. Pet. App. 112a-128a. The court held that Valder was entitled to absolute immunity for certain of his alleged actions but not for others. *Id.* at 116a-123a. As for respondent's claims against the postal inspectors, the court affirmed the dismissal of the malicious prosecution claim, because "it has not been clearly established that malicious prosecution violates any constitutional or statutory right," but reversed the dismissal of the retaliatory prosecution claim, because that claim "does allege the violation of clearly established law" and "meet[s] any applicable heightened pleading standard." *Id.* at 124a-126a. The

court of appeals also reinstated some of respondent's FTCA claims. *Id.* at 126a-128a.[4]

3. a. On remand, the district court granted Valder's motion for summary judgment, holding that respondent could not establish that Valder brought the prosecution to retaliate against respondent for his First Amendment activity, because absolute immunity protected his decision to prosecute. The district court denied the postal inspectors' motion for summary judgment, however, and allowed limited discovery on the question whether they had the requisite retaliatory motive. The court also granted the United States' motion for judgment on the pleadings on the FTCA claims. Pet. App. 59a-111a.

b. Respondent again appealed, and the court of appeals again affirmed in part and reversed in part. Pet. App. 43a-58a. The court of appeals held that the district court had correctly granted summary judgment for Valder, but it reinstated one of respondent's FTCA claims (for malicious prosecution). *Id.* at 48a-58a.[5]

4. On remand, the postal inspectors again moved for summary judgment, arguing that "they enjoy qualified immunity because probable cause supported [respondent's] prosecution." Pet. App. 6a. The United States also moved for summary judgment on respondent's malicious prosecution claim under the FTCA. Concluding that "[t]here are material facts in dispute," the district court denied the motion in a one-paragraph order. *Id.* at 42a.

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[4] At this stage, Valder filed a petition for a writ of certiorari, which this Court denied. *Valder* v. *Moore*, 519 U.S. 820 (1996).

[5] This time, respondent filed a petition for a writ of certiorari, which this Court denied. *Moore* v. *Valder*, 531 U.S. 978 (2000).

5. Petitioners (but not the United States) appealed, and the court of appeals affirmed. Pet. App. 1a-31a. The court first held that it had jurisdiction over petitioners' appeal, reasoning that the district court's denial of qualified immunity turned on an issue of law and was therefore a collateral order subject to immediate appeal despite the absence of a final judgment. *Id.* at 7a-9a. The court then held that petitioners' motion for summary judgment had been properly denied. *Id.* at 10a-31a. Recognizing that a defendant in a *Bivens* suit is entitled to qualified immunity unless he violated a clearly established right, the court concluded that retaliatory prosecution violates the First Amendment even when there is probable cause for the charges and that that principle was clearly established at the time the charges were brought against respondent. *Ibid.* The court therefore did not decide whether there was probable cause for the charges (or whether it was reasonable for petitioners to believe there was probable cause). *Id.* at 12a. Instead, the court remanded for trial on the question whether petitioners had a retaliatory motive that was the but-for cause of the prosecution. *Id.* at 31a.

a. The court of appeals held that the first question in the qualified immunity inquiry—whether probable cause defeats a claim of retaliatory prosecution—"ha[d] already been answered" by the District of Columbia Circuit, in a case called *Haynesworth* v. *Miller*, 820 F.2d 1245 (1987). Pet. App. 12a. That case, the court said, "described the 'essential elements of a retaliatory prosecution claim,'" and did not "suggest that lack of probable cause is an element." *Id.* at 12a-13a (quoting *Haynesworth*, 820 F.2d at 1257 n.93). The court explained that, under the standard articulated in *Haynesworth*, "once a plaintiff shows protected conduct to have been a moti-

vating factor in the decision to press charges, the burden shifts to the officials to show that they would have pursued the case anyway." *Id.* at 13a. The court went on to say that "that description of the tort was part of *Haynesworth*'s holding, [and] we lack authority to disregard it." *Id.* at 14a.

Citing decisions of the Second, Third, Fifth, Eighth, and Eleventh Circuits, the court of appeals recognized that "several other circuits" do "require lack of probable cause in retaliatory prosecution actions." Pet. App. 15a. But those decisions, the court said, "are not the law of this circuit—*Haynesworth* is." *Ibid.* The court also noted that two other circuits—the Sixth and the Tenth—do not require a showing of a lack of probable cause. *Ibid.* The court found support for its approach in *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), which involved a public school teacher's claim that he had been fired because of his speech. Pet. App. 15a-16a. In that case, the court of appeals explained, a showing that speech protected by the First Amendment was a "motivating factor" in the teacher's firing was deemed sufficient to shift the burden to the school board to establish that "it would have reached the same decision" even in the absence of the speech. *Ibid.* (quoting *Mt. Healthy*, 429 U.S. at 287).

While the court thought "*Haynesworth*'s binding effect" sufficient "to end the first part of [the] qualified immunity inquiry," the court acknowledged that petitioners had "raised serious objections to [its] approach," and thus deemed it "useful to flesh out the reasons why the existence of probable cause should not necessarily preclude liability." Pet. App. 16a. In the court's view, probable cause is "designed for the ordinary arrest or prosecution where courts may presume that government

officials exercised their discretion in good faith," not cases where the plaintiff can "demonstrate hostility to free speech to have been a motivating factor in the decision to prosecute." *Ibid.* The court of appeals acknowledged this Court's admonition in the analogous context of a selective prosecution claim that prosecutorial discretion is a "core executive constitutional function." *Id.* at 17a (quoting *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996)). But the court of appeals nevertheless rejected petitioners' argument that, just as a claim of selective prosecution requires an objective showing that similarly situated people were not prosecuted, see *Armstrong*, 517 U.S. at 465, a claim of retaliatory prosecution requires an objective showing that there was no probable cause for the prosecution. Pet. App. 17a-18a. The court said that "*Haynesworth*'s framework" is "[r]espectful of executive discretion," because it "allows the government to proceed with prosecutions that, though motivated in part by hostility to First Amendment activity, can be justified on legitimate grounds." *Id.* at 17a. It is only when "hostility to speech represents a but-for cause of the prosecution," the court explained, that a plaintiff can establish a violation of the First Amendment. *Ibid.*

The court of appeals characterized its theory of liability as "limited," because, in its view, a showing of probable cause "will be enough in most cases to establish that prosecution would have occurred absent bad intent." Pet. App. 19a. Recovery will be possible, the court said, only in the "rare cases where strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus." *Id.* at 20a. The

court thought that the case before it was "an example of this rare circumstance." *Ibid.*

b. The court of appeals held that the second question in the qualified immunity inquiry—whether it was clearly established that probable cause does not defeat a claim of retaliatory prosecution—was also answered by *Haynesworth*. That case, the court said, was "[d]ecided in 1987, a year before [respondent's] indictment," and it "clearly stated the elements of retaliatory prosecution, leaving no doubt that government officials could be liable for pressing charges they would not have pursued without bad motive." Pet. App. 29a. The court held that the law was clearly established despite the fact that *Haynesworth* addressed the nature of a First Amendment retaliatory prosecution claim "without analysis in a footnote in an opinion generally addressing other issues," because "qualified immunity requires only that the law be clear, not that it be stated prominently or elaborately." *Ibid.* (quoting 03-5241 Pet. C.A. Reply Br. 12). The court also found it irrelevant that other circuits do require an absence of probable cause, because "a decision of this court—*Haynesworth*—provided guidance on exactly the issue [petitioners] confronted." *Id.* at 30a.

SUMMARY OF ARGUMENT

Petitioners are entitled to summary judgment on respondent's claim of retaliatory prosecution. That claim requires an absence of probable cause for the criminal charges, and respondent cannot make that showing.

I. The process leading to a decision to prosecute is one that courts are hesitant to examine, because it is "particularly ill-suited to judicial review," *Wayte* v.

United States, 470 U.S. 598, 607 (1985), and examination by courts risks "unnecessarily impair[ing] the performance of a core executive constitutional function," *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996). This Court has relied on those considerations in a variety of contexts, including cases involving a claim of selective prosecution, in violation of the defendant's equal protection rights. The Court's decisions make clear that the standard for selective prosecution is highly demanding and thus rarely satisfied. *United States* v. *Bass*, 536 U.S. 862 (2002) (per curiam); *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-490 (1999); *Armstrong*, *supra*; *Wayte*, *supra*. In a selective prosecution case, there must be both a subjective showing that the decision to prosecute was motivated by a discriminatory purpose and an objective showing that similarly situated members of a different class were not prosecuted. While this Court's decisions thus make clear that a claimant cannot establish selective prosecution merely by showing that his race was the but-for cause of the prosecution, the court of appeals held that a claimant *can* establish *retaliatory* prosecution merely by showing that his *speech* was the but-for cause of the prosecution. There is no basis for treating these claims so differently.

Contrary to the court of appeals' conclusion, a claim of retaliatory prosecution also requires an objective showing, and that showing, as five courts of appeals have held, is an absence of probable cause for the charges. Retaliatory prosecution is a form of malicious prosecution (the malicious purpose being retaliation for the defendant's speech), and at common law, the absence of probable cause was an essential element of a claim of malicious prosecution. That was the rule when the First

Amendment was adopted, and it remains the rule today. Because the "particular concern" about the "systemic costs" of judicial inquiry necessitates an objective element for a claim that a prosecution was motivated by a constitutionally prohibited factor, *Wayte*, 470 U.S. at 607, and because this Court routinely consults the common law in attempting to determine the content of constitutional provisions, a prosecution motivated by the defendant's speech does not violate the First Amendment if there was probable cause for the charges.

The standard adopted by the court of appeals is not, as the decision claimed, either "[r]espectful of executive discretion" (Pet. App. 17a) or otherwise "limited" (*id.* at 19a), because it permits an inquiry into the motives for a prosecution in virtually every retaliatory prosecution case. The court of appeals' requirement that "hostility to speech [be] a but-for cause" of the challenged conduct (*id.* at 17a) is a general rule for retaliation claims, not a special rule for claims of retaliatory *prosecution*. And even if it were, it would not limit the ability of a court or civil jury to examine the motives of law enforcement officers. Nor is there any reason to suppose that a showing of probable cause "will be enough in most cases" to satisfy the court of appeals' standard. *Id.* at 19a. That statement appears to rest on an empirical assumption (that prosecutions are generally brought if probable cause exists) whose accuracy may vary depending on the nature of the crime. More broadly, probable cause is only one of many factors that bear upon the exercise of prosecutorial discretion. In any event, even if probable cause will ordinarily enable law enforcement officers to avoid *liability* under the court of appeals' standard, it will not enable them to avoid *protracted litigation*, because an improper motive is "easy to allege

and hard to disprove." *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 175 (2004) (quoting *Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998)). The court of appeals' but-for test thus invites discovery into prosecutorial decisionmaking, a prospect this Court has studiously avoided in cases like *Armstrong* and *Bass*. For these reasons, the court of appeals' reliance on *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), is misplaced. The retaliatory action in that case was alleged to have been taken by an *employer* against an *employee*, and thus the special considerations governing challenges to prosecutorial decisionmaking were inapplicable.

Even if the First Amendment were violated whenever a retaliatory motive was the but-for cause of a prosecution, a cause of action for damages under *Bivens* should not lie if probable cause existed. That conclusion follows from *Heck* v. *Humphrey*, 512 U.S. 477 (1994), in which this Court looked to the elements of the analogous common law tort in determining the elements of a constitutional tort in an action under 42 U.S.C. 1983. As noted above, malicious prosecution is the common law tort most analogous to retaliatory prosecution, and absence of probable cause is an essential element of the common law tort.

II. Because the court of appeals' mistaken analysis obviated the need for that court to inquire into the existence of probable cause, this Court could leave that issue for remand. If the Court chooses to reach the issue, however, it is clear that there was probable cause for the charges against respondent. Voss pressed respondent to act on his recommendation to hire GAI, and respondent in turn pressed Reedy to do so. Gnau made comments to Reedy, respondent's close associate, suggest-

ing that Gnau's arrangement with Voss was improper, and Reedy later denied—falsely—having gotten the referral from Voss. Respondent's own notes reflect what appear to be conversations with Voss that suggest awareness of the kickback scheme, and there was evidence that respondent may have altered or destroyed records relating to the investigation and coached his employees on how to answer questions from investigators. Respondent also provided an implausible explanation of his involvement in Spartin's recruitment of a new Postmaster General. Accordingly, even if the evidence did not establish respondent's guilt beyond a reasonable doubt, it was "sufficient to warrant a prudent man in believing," *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964), that he was a member of the conspiracy.

ARGUMENT

PETITIONERS ARE ENTITLED TO SUMMARY JUDGMENT ON RESPONDENT'S CLAIM OF RETALIATORY PROSECUTION

The court of appeals held that a plaintiff can bring a *Bivens* action for retaliatory prosecution in violation of the First Amendment if he shows that the charges were motivated by the plaintiff's protected speech and the defendant fails to show that the case would otherwise have been pursued. The court of appeals' holding is incorrect. A claim of retaliatory prosecution requires a showing that there was no probable cause for the charges. And because there was probable cause for the charges against respondent, petitioners are entitled to summary judgment.

I. A *BIVENS* PLAINTIFF MUST SHOW THE ABSENCE OF PROBABLE CAUSE TO ESTABLISH A CLAIM OF RETALIATORY PROSECUTION

A. Special Considerations Govern Constitutional Challenges To Prosecutorial Decisionmaking

The authority to prosecute crimes is an essential component of the President's constitutional responsibility to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, and thus is "one of the core powers of the Executive Branch of the Federal Government," *United States* v. *Armstrong*, 517 U.S. 456, 467 (1996). Because the prosecution of crimes is a "special province" of the Executive Branch, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999); *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985), courts are "properly hesitant to examine the decision whether to prosecute," *Wayte* v. *United States*, 470 U.S. 598, 608 (1985). As this Court has explained, judicial deference in this area has two related justifications.

The first is "the relative competence of prosecutors and courts." *Armstrong*, 517 U.S. at 465. The decision to file criminal charges "requires consideration of a wide range of factors," *United States* v. *Lovasco*, 431 U.S. 783, 794 (1977), including "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan," *Wayte*, 470 U.S. at 607. Other factors that bear upon the exercise of prosecutors' "broad discretion," *ibid.* (quoting *United States* v. *Goodwin*, 457 U.S. 368, 380 n.11 (1982)), include the "extent of the harm caused by the offense," the "disproportion of the authorized punishment in relation to the particular offense or the of-

fender," the "reluctance of the victim to testify," the "cooperation of the accused in the apprehension or conviction of others," and the "availability and likelihood of prosecution by another jurisdiction," *Lovasco*, 431 U.S. at 794 n.15 (quoting ABA Project on Standards for Criminal Justice, *The Prosecution Function* § 3.9(b) (App. Draft 1971)). Because these factors are not "readily susceptible to the kind of analysis the courts are competent to undertake," the decision to prosecute is "particularly ill-suited to judicial review." *Wayte*, 470 U.S. at 607.

The second justification for judicial deference in the area of prosecutorial decisionmaking is "a concern not to unnecessarily impair the performance of a core executive constitutional function." *Armstrong*, 517 U.S. at 465. Accord *United States* v. *Bass*, 536 U.S. 862, 864 (2002) (per curiam). Examining the underlying motivations for a prosecution "[can] delay[] the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Wayte*, 470 U.S. at 607. Challenges to prosecutorial decisionmaking also "cause a deflection of the prosecutor's energies from his public duties" and may cause the prosecutor to "shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler* v. *Pachtman*, 424 U.S. 409, 423 (1976).

This Court has relied on these considerations in a variety of contexts, and its cases "uniformly have recognized that courts normally must defer to prosecutorial decisions as to whom to prosecute." *Town of Newton* v. *Rumery*, 480 U.S. 386, 396 (1987) (opinion of Powell, J.). For example, the Court has held that a prosecutor is

absolutely immune from a suit under 42 U.S.C. 1983 that challenges any action taken in the prosecutor's capacity as an advocate. *Kalina* v. *Fletcher*, 522 U.S. 118 (1997); *Burns* v. *Reed*, 500 U.S. 478 (1991); *Imbler*, *supra*. It has held that delay in the filing of charges does not violate due process, even if the defendant has been prejudiced by the lapse of time. *Lovasco*, *supra*. It has held that filing more serious charges after the defendant declines to plead guilty to the original charge does not violate due process. *Goodwin*, *supra*; *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). It has held that an agreement to dismiss charges in exchange for the defendant's agreement not to file a civil suit is enforceable. *Rumery*, *supra*. And, as explained below, the Court has relied on principles of deference to prosecutorial decisionmaking in cases involving a claim of selective prosecution. *Bass*, *supra*; *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 489-490; *Armstrong*, *supra*; *Wayte*, *supra*.

B. A Claim Of Retaliatory Prosecution Requires An Objective Showing That The Prosecution Was Not Supported By Probable Cause

1. Because the "systemic costs" of judicial inquiry in the area of prosecutorial decisionmaking are of "particular concern," *Wayte*, 470 U.S. at 607, this Court's decisions involving a claim of selective prosecution, in violation of the defendant's equal protection rights, have "taken great pains to explain that the standard is a demanding one," *Armstrong*, 517 U.S. at 463. The standard requires "clear evidence" displacing the presumption of regularity, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 489 (quoting *Armstrong*, 517 U.S. at 464 (quoting *United States* v. *Chemi-*

cal Found., Inc., 272 U.S. 1, 14 (1926))), and imposes a "significant barrier" to relief, *Armstrong*, 517 U.S. at 464. As this Court has explained, a successful selective prosecution claim is therefore "a *rara avis*." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 489. That is true even though government actions based on race are generally subject to highly exacting review, even in contexts where deference is otherwise required. See, *e.g.*, *Johnson* v. *California*, 125 S. Ct. 1141, 1146-1152 (2005).

The "particularly demanding" standard for claims of selective prosecution, *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 489, has both a subjective and an objective component. To prevail, the claimant must show not only that the decision to prosecute "was motivated by a discriminatory purpose," but also that it "had a discriminatory effect." *Wayte*, 470 U.S. at 608. The latter, objective requirement means that the claimant must show that similarly situated members of a different group were treated differently. Thus, when the allegation is that the prosecution was motivated by the claimant's race, there must be a showing that "similarly situated individuals of a different race were not prosecuted." *Armstrong*, 517 U.S. at 465. The objective element serves as a screening mechanism, so that courts will not be required to "[e]xamin[e] the basis of [the] prosecution," *Wayte*, 470 U.S. at 607, in every case in which there is a claim of discriminatory motive. See, *e.g.*, *Bass*, 536 U.S. at 863; *id.* at 864 (allowing discovery without proof of objective element "threatens the 'performance of a core executive constitutional function'") (quoting *Armstrong*, 517 U.S. at 465); *Armstrong*, 517 U.S. at 469-470. An improper motive is "easy to allege and hard to disprove," *National Archives & Records*

Admin. v. *Favish*, 541 U.S. 157, 175 (2004) (quoting *Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998)), and can be expected to be alleged "with some frequency," for "a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the [government's] advocate," *Imbler*, 424 U.S. at 425.

Under this Court's cases, therefore, a selective prosecution claimant cannot obtain discovery into prosecutorial decisionmaking merely by alleging an improper motive, and cannot establish a violation simply by showing a discriminatory purpose, without making an objective showing that others similarly situated were treated differently. In this case, by contrast, the court of appeals held that a *retaliatory* prosecution claimant *can* obtain discovery into prosecutorial decisionmaking merely by alleging an improper motive, and *can* establish a violation by showing that his *speech* was the but-for cause of the prosecution, without making an objective showing. Indeed, the court of appeals further widened the disparity by placing the burden on the defendant to demonstrate that the prosecution would have otherwise been brought. In the selective prosecution context, by contrast, the burden to make the objective showing rests on the claimant, even though much of the relevant information may be in the prosecution's files.

There is no basis for treating these similar types of constitutional challenges to prosecutions so differently. Free speech rights are important to criminal defendants, but certainly no more so than the equal protection of the laws. Indeed, while race never plays a proper role in the exercise of prosecutorial discretion, statements by defendants and other First Amendment-protected activity often provide evidence of a crime in a way that prop-

erly influences prosecutorial discretion. See, *e.g.*, *Wayte*, 470 U.S. at 612-613 (noting that letters to the Selective Service, which clearly involved First Amendment activity, "provided strong, perhaps conclusive evidence" of "one of the elements of the offense"). Likewise, the exercise of the power to prosecute—"one of the core powers of the Executive Branch," *Armstrong*, 517 U.S. at 467—is no less important to the federal government when it is challenged under the First Amendment than when it is challenged under the equal protection component of the Due Process Clause. To the contrary, the Court has generally recognized that, in the absence of an equal protection violation, the prosecutor is free to file charges supported by probable cause. See *Bordenkircher*, 434 U.S. at 364-365. Accordingly, if a selective prosecution claimant must make an objective showing before a court or civil jury may take the extraordinary step of inquiring into the government's motives for bringing criminal charges, then, *a fortiori*, some objective showing is likewise required of a retaliatory prosecution claimant.

2. The remaining question is what objective showing is required for a retaliatory prosecution claim. The answer, as five courts of appeals have held,[6] is an absence

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[6] See *Izen* v. *Catalina*, 398 F.3d 363, 367-368 (5th Cir. 2005), petition for cert. pending, No. 05-64 (filed July 11, 2005); *Draper* v. *Reynolds*, 369 F.3d 1270, 1277 n.11 (11th Cir.), cert. denied, 125 S. Ct. 507 (2004); *Wood* v. *Kesler*, 323 F.3d 872, 883 (11th Cir.), cert. denied, 540 U.S. 879 (2003); *Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002); *Keenan* v. *Tejeda*, 290 F.3d 252, 260 (5th Cir. 2002); *Curley* v. *Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001); *Smithson* v. *Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000); *Merkle* v. *Upper Dublin Sch. Dist.*, 211 F.3d 782, 796 (3d Cir. 2000); *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995), cert. denied, 517 U.S. 1189 (1996); *Mozzochi* v. *Borden*, 959 F.2d 1174, 1179-1180 (2d Cir. 1992). But see

of probable cause for the charges. Probable cause generally defines the point at which respect for prosecutorial discretion predominates. "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Wayte*, 470 U.S. at 607 (quoting *Bordenkircher*, 434 U.S. at 364). Accordingly, "[a]n individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause that is in reality an * * * attempt to deter or silence criticism of the government." *Mozzochi* v. *Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992). Any other rule would open up the prosecutorial decisionmaking process whenever a retaliatory motive is alleged.

This conclusion finds support in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), a constitutional tort case that relied on common law principles. In *Heck*, a state prisoner filed an action under 42 U.S.C. 1983, alleging that the prosecutors and a police investigator in the criminal case had violated his constitutional rights by conducting an illegal investigation, destroying exculpatory evidence, and using an unlawful voice-identification procedure at trial. This Court held that the prisoner's claims were not cognizable under Section 1983. In so holding, the Court "look[ed] * * * to the common law of torts." 512 U.S. at 483. It determined that "[t]he common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here," and that "[o]ne element that must be alleged and proved

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Greene v. *Barber*, 310 F.3d 889, 896-897 (6th Cir. 2002); *Poole* v. *County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001).

in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Id.* at 484. Because the plaintiff could not establish that element, the Court held that he had no cause of action. Cf. *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59-63 (1993) (to establish sham exception to antitrust immunity under *Noerr-Pennington* doctrine, plaintiff must satisfy threshold objective element, drawn from tort of malicious prosecution, of absence of probable cause for prior suit before court examines defendant's subjective motivations).

Similar logic applies here. A claim of retaliatory prosecution has been aptly described as "a First Amendment claim of malicious prosecution." *Johnson* v. *Louisiana Dep't of Agric.*, 18 F.3d 318, 320 (5th Cir. 1994). The common law tort requires proof that the prosecution was commenced "primarily for a purpose other than that of bringing an offender to justice," Restatement (Second) of Torts § 653, at 406 (1977), and a retaliatory prosecution is a prosecution commenced for one such purpose. Indeed, at an earlier stage of the case, respondent acknowledged that his claim is "essentially [one] of malicious prosecution in retaliation for the exercise of a constitutional right." 99-5197 Resp. C.A. Br. 35.

As this Court recognized in *Heck*, one of the elements of a malicious prosecution claim is that "the prior proceeding was without probable cause." 512 U.S. at 485 n.4 (1994). See, *e.g.*, Restatement (Second) of Torts, *supra*, § 653, at 406 (plaintiff must prove that defendant "initate[d] or procure[d] the proceedings without probable cause"); 8 Stuart M. Speiser et al., *The American Law of Torts* § 28:7, at 38 (1991) ("it is fundamental that lack or want of probable cause is an essential element

for successful pursuance of such an action"). Indeed, nearly 150 years ago, the Court explained that

> [m]alice alone * * * is not sufficient to sustain the action, because a person actuated by the plainest malice may nevertheless prefer a well-founded accusation, and have a justifiable reason for the prosecution of the charge. Want of reasonable and probable cause is as much an element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecutor to make the accusation.

Wheeler v. *Nesbitt*, 65 U.S. (24 How.) 544, 550 (1861). Accord *Brown* v. *Selfridge*, 224 U.S. 189, 191-193 (1912); *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter-House Co.*, 120 U.S. 141, 147-151 (1887); *Stewart* v. *Sonneborn*, 98 U.S. 187, 192-197 (1879); *Stacey* v. *Emery*, 97 U.S. 642, 645-646 (1878); *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 402 (1852); *White* v. *Nicholls*, 44 U.S. (3 How.) 266, 289 (1845); *Gelston* v. *Hoyt*, 16 U.S. (3 Wheat.) 246, 281 (1818). The rationale for that principle is the "obvious polic[y] of the law in favor of encouraging proceedings against those who are apparently guilty." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 119, at 876 (5th ed. 1984). Accord 8 Stuart M. Speiser et al., *supra*, § 28:3, at 10-11. Perhaps because of that policy, lack of probable cause has been described, not only as an essential element, but as the "most important element," *Porter* v. *Mack*, 40 S.E. 459, 464 (W. Va. 1901), and the "lynchpin," *Kerney* v. *Aetna Cas. & Sur. Co.*, 648 S.W.2d 247, 251 (Tenn. Ct. App. 1982), of the common law tort of malicious prosecution.

Heck's reliance on the common law to identify the contours of an actionable constitutional violation is far from anomalous. This Court "frequently consult[s] * * * common law in attempting to determine the content of constitutional provisions." *Loving* v. *United States*, 517 U.S. 748, 779 (1996) (Thomas, J., concurring in the judgment).[7] As a number of the authorities on which this Court relied in *Wheeler* v. *Nesbitt* demonstrate, see 65 U.S. (24 How.) at 550-551, the common law at the time of the adoption of the First Amendment was the same as the common law today: it was not a civil wrong to file criminal charges on the basis of an improper motive so long as there was probable cause to believe that a crime had been committed. "From 1766 to the present day, such has been constantly held to be the law, both in England and this country." *Stewart* v. *Sonneborn*, 98 U.S. at 193. Indeed, the rule was recognized by Blackstone himself. See 3 William Blackstone, *Commentaries* 127 (1768) (in malicious prosecution action, "any probable cause for preferring [the indictment] is sufficient to justify the defendant"). The common law

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[7] See, *e.g.*, *United States* v. *Booker*, 125 S. Ct. 738, 753 (2005) (Sixth Amendment right to trial by jury); *Crawford* v. *Washington*, 541 U.S. 36, 54 (2004) (Sixth Amendment right to confront witnesses); *United States* v. *Balsys*, 524 U.S. 666, 674 & n.5, 680-688 (1998) (Fifth Amendment privilege against self-incrimination); *Wilson* v. *Arkansas*, 514 U.S. 927, 931 (1995) (Fourth Amendment prohibition of unreasonable searches); *Honda Motor Corp.* v. *Oberg*, 512 U.S. 415, 430 (1994) (Fourteenth Amendment right to due process); *United States* v. *Dixon*, 509 U.S. 688, 704 (1993) (Fifth Amendment double jeopardy prohibition); *Griffin* v. *United States*, 502 U.S. 46, 49-51 (1991) (Fifth Amendment right to due process); *Ingraham* v. *Wright*, 430 U.S. 651, 659 (1977) (Eighth Amendment prohibition of cruel and unusual punishments); *Branzburg* v. *Hayes*, 408 U.S. 665, 685 (1972) (First Amendment rights to free speech and free press).

thus precluded a challenge to a prosecution that *could have been brought* (because there was probable cause), even if it could be shown that it *would not have been brought* (because of an improper motive). See *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) at 402 ("[T]he reason for the rule * * * is 'that it would be a very great discouragement to public justice * * * if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried.'") (quoting 3 William Blackstone, *supra*, at 126).

Grounding the First Amendment standard in the specific context of retaliatory *prosecution* in the law of malicious *prosecution* only makes sense. Concerns about improper retaliation for activity protected by the First Amendment need to account for the form the alleged retaliation takes and the constitutional norms relevant to that particular type of government conduct. See, e.g., *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 487-491. The prosecution context involves acute risks of "very great discouragement to public justice," *Dinsman*, 53 U.S. (12 How.) at 402 (quoting 3 Blackstone, *supra*, at 126), and the First Amendment test is appropriately tailored to that context.

The long-recognized common law rule thus affords a "background presumption," *Armstrong*, 517 U.S. at 463 (quoting *United States* v. *Mezzanatto*, 513 U.S. 196, 203 (1995)), regarding the showing necessary for a claim that a prosecution had an improper motivation, including retaliation for the exercise of First Amendment rights. It is both logical and faithful to the Nation's legal heritage and traditions that an absence of probable cause is the objective element of a First Amendment claim of retaliatory prosecution necessitated by this Court's

"particular concern" about the "systemic costs" of judicial inquiry, *Wayte*, 470 U.S. at 607, into the exercise of the "core executive constitutional function" of prosecutorial decisionmaking, *Armstrong*, 517 U.S. at 465.

C. The Court Of Appeals' Standard Disregards The Special Considerations That Govern Constitutional Challenges To Prosecutorial Decisionmaking

1. The court of appeals' decision does not require a retaliatory prosecution claimant to establish *any* objective element. Under its standard, a plaintiff need only allege and then show that "protected conduct" was "a motivating factor in the decision to press charges," and the burden then shifts to the defendant to show that he "would have pursued the case anyway." Pet. App. 13a. If that standard were adopted by this Court, there would be an after-the-fact "[e]xamin[ation] [of] the basis of a prosecution," *Wayte*, 470 U.S. at 607, in every case in which the speech at issue was protected by the First Amendment. Adoption of that standard would also make litigation more expensive and time-consuming, because an improper motive is "easy to allege and hard to disprove," *National Archives & Records Admin.*, 541 U.S. at 175 (quoting *Crawford-El*, 523 U.S. at 585), and a defendant would be unable to terminate the suit at an early stage by virtue of the plaintiff's inability to make an objective showing. The court of appeals' standard is thus inconsistent with the considerations on which this Court has relied in its decisions addressing constitutional challenges to prosecutorial decisionmaking. In particular, the standard threatens to "undermine prosecutorial effectiveness," *Wayte*, 470 U.S. at 607, by "revealing the Government's enforcement policy," *ibid.*, "deflect[ing]" the "energies" of officers from their "pub-

lic duties," *Imbler*, 424 U.S. at 423, "delay[ing] the criminal proceeding" (if the claim can be raised in the criminal case), *Wayte*, 470 U.S. at 607, and generally "chill[ing] law enforcement," *ibid.* These threats are most pronounced in the area of public corruption, where, by virtue of their status as, or interactions with, government officials, subjects and targets of criminal investigations will frequently be in a position to assert a First Amendment claim. But the potential difficulty will be present in many criminal cases, because First Amendment-protected activity often factors into the exercise of prosecutorial discretion. See *supra*, pp. 23-24.

The court of appeals insisted that its standard *is* "[r]espectful of executive discretion" because it "allows the government to proceed with prosecutions that, though motivated in part by hostility to First Amendment activity, can be justified on legitimate grounds." Pet. App. 17a. But a legal standard is not respectful of Executive discretion merely because it requires an ultimate finding that "hostility to speech [was] a but-for cause of the prosecution." *Ibid.* That requirement provides no unique rule for retaliation claims *in the prosecutorial context*. Rather, it is a minimum showing applicable in *every* context; a retaliatory motive causes no injury if the action would have been taken in any event. See *Crawford-El* v. *Britton*, 523 U.S. at 593. Even if the requirement were unique to prosecutorial decisions, the court of appeals' standard would still not be respectful of Executive discretion, because this Court's cases make clear that inquiry into motives for bringing a prosecution should be the rare exception rather than the rule, and should be limited to cases where the claimant can make the requisite objective showing at the threshold.

The court of appeals' standard permits an inquiry into motives, supported by discovery, in virtually every retaliatory prosecution case, and thus interferes with "one of the core powers of the Executive Branch," *Armstrong*, 517 U.S. at 467, regardless of whether the officers are ultimately found to have had an improper motive that was the but-for cause of the prosecution.

The court of appeals also claimed that its "theory of liability" is "limited" because "probable cause ordinarily suffices to initiate a prosecution," and a showing of probable cause will therefore "be enough in most cases to establish that prosecution would have occurred absent bad intent." Pet. App. 19a. That observation suffers from several flaws. As an initial matter, it rests on an unproven empirical assumption (that almost all potential prosecutions that satisfy the probable cause standard are in fact brought) whose accuracy likely varies depending on the nature of the underlying crime. While the assumption may be accurate for particularly heinous crimes, there are other, less serious, crimes for which a finding of probable cause would be far from a sufficient basis for expending prosecutorial resources. In any event, the court of appeals' decision all but demands inquiry into the standards for exercising prosecutorial discretion, and thus cannot reasonably be viewed as "limited." Whether the existence of probable cause would, by itself, have led to the filing of charges can only be determined after discovery into the prosecutorial decisionmaking of the relevant prosecutor's office.

More fundamentally, once it is accepted that the absence of probable cause is not an element of the cause of action (and that its presence is not a defense), there is no reason to think that evidence about the existence of probable cause will be particularly significant to the in-

quiry before the jury. As the court of appeals recognized, "probable cause usually represents only one factor among many in the decision to prosecute—some others being the strength of the evidence, the resources required for the prosecution, the relation to enforcement priorities, and the defendant's culpability." *Id.* at 13a. See also *Armstrong*, 517 U.S. at 465; *Wayte*, 470 U.S. at 607; *Lovasco*, 431 U.S. at 794 n.15. Under the court of appeals' standard, there are thus likely to be many cases in which there is not "weak," Pet. App. 20a, but strong probable cause, and the jury nevertheless returns a verdict for the plaintiff, based on a finding of improper motive and a determination that the many other considerations that bear upon the exercise of prosecutorial discretion would not independently have resulted in the filing of charges. Cf. *Imbler*, 424 U.S. at 425 (suits against prosecutors that went to trial would pose "substantial danger of liability even to the honest prosecutor," because they would often raise issues on which even judges sometimes come to "differing conclusions").

For these reasons, the court of appeals' reliance on *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), see Pet. App. 15a-16a, is misplaced. *Mount Healthy* holds that a plaintiff has the burden of proving that his speech was constitutionally protected and that it was a motivating factor in the decision being challenged; the burden then shifts to the defendant to show that the same decision would have been reached even if the plaintiff had not expressed the speech in question. 429 U.S. at 287. The court of appeals' adoption of that standard is erroneous because *Mount Healthy* did not involve retaliatory *prosecution*. Like the other decisions in the line of cases beginning with *Pickering* v. *Board of Education*, 391 U.S. 563

(1968), *Mount Healthy* involved retaliatory action against an *employee* by a public *employer*, and thus the special considerations governing constitutional challenges to prosecutorial decisionmaking were inapplicable.

As Judge Leval has observed, "a plaintiff alleging a claim of selective *prosecution* in violation of the Equal Protection Clause must plead and establish the existence of similarly situated individuals who were not prosecuted," because "courts grant special deference to the executive branch in the performance of the 'core' executive function of deciding whether to prosecute." *Pyke* v. *Cuomo*, 258 F.3d 107, 109 (2d Cir. 2001). In an ordinary equal protection case, by contrast, "[t]he *Armstrong* rule has no application" and the plaintiff "need not plead or show the disparate treatment of other similarly situated individuals." *Ibid.* The same is true *a fortiori* in First Amendment cases. In an ordinary retaliation case, like *Mount Healthy*, the defendants are not performing a "'core' executive function," *ibid.*, there is typically little justification for "special deference to the executive branch," *ibid.*, and there is consequently no basis for requiring the plaintiff to plead and prove an objective element.[8] There is manifestly a basis for an objective element, however, in a case, like this one, that involves a claim of retaliatory *prosecution*.[9]

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[8] Of course, if the plaintiff challenging an employment action is a high-ranking politically appointed official, there is a greater potential for interference with core Executive functions, and no First Amendment claim lies. See *Waters* v. *Churchill*, 511 U.S. 661, 672 (1994) (opinion of O'Connor, J.)

[9] The court of appeals' reliance on *Crawford-El* v. *Britton*, *supra*, see Pet. App. 19a, is also misplaced. In *Crawford-El*, this Court rejected "special procedural rules" for "constitutional claim[s] that re-

2. The logic of the First Amendment holding below is not just that those acquitted in unsuccessful prosecutions should be able to bring constitutional tort actions even if the prosecution was supported by probable cause. The court of appeals' decision also suggests that criminal defendants would possess a First Amendment defense to an ongoing prosecution that, while supported by probable cause, would nonetheless not have been brought but for an allegedly retaliatory motive. That is not the context in which retaliatory prosecution claims have tended to arise, presumably because of the firmly grounded common law rule that a necessary prerequisite for a malicious prosecution claim is the favorable (to the defendant) resolution of the criminal case. See *Heck*, 512 U.S. at 484-486. The logic of the opinion below, however, would dispense with both the favorable-termination requirement and the absence-of-probable-cause requirement, and would routinely allow defendants to raise a First Amendment defense to criminal charges supported by probable cause. That prospect only underscores the flaw in the court of appeals' reasoning and the

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quire[] proof of improper motive," 523 U.S. at 577, and also rejected a "proposal to immunize all officials whose conduct is 'objectively valid,' regardless of improper intent," *id.* at 594. This case does not implicate an across-the-board rule of procedure or immunity for claims requiring proof of improper motive. Rather, petitioners' position is that, in the unique context of prosecutorial decisionmaking (which was not at issue in *Crawford-El*), a substantive claim of retaliation in violation of the First Amendment will not lie if the charges were supported by probable cause. Of course, the absence of an across-the-board procedural device to weed out frivolous claims only heightens the need for an objective standard in a context like prosecution, where many defendants are likely to believe that they are victims of discrimination or retaliation and routine inquiry into the government's decisionmaking would undermine a core Executive function.

need, at a minimum, for an objective screen, as in *Wayte* and *Armstrong*.[10]

If, however, the Court wanted to reserve the broader First Amendment question, it could limit its holding to the elements of the constitutional tort under *Bivens* and 42 U.S.C. 1983. That approach would be consistent with this Court's decision in *Heck* v. *Humphrey*, *supra*, which established the principle that a cause of action for a constitutional violation under Section 1983 incorporates the elements of the analogous common law cause of action. See 512 U.S. at 483-490. See also *Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997) ("we have examined common-law doctrine when identifying both the elements of the [Section 1983] cause of action and the defenses available to state actors").[11] Although petitioners focused their arguments in the lower courts on the broader First Amendment issue, the contention that the absence of probable cause is an element of the constitutional tort in

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[10] Indeed, the equal protection context appears to be the only one in which courts will entertain this type of constitutional challenge to the initial charges in an ongoing criminal prosecution.

[11] While *Heck* was a Section 1983 action against state officials, its rationale applies *a fortiori* to *Bivens* actions against federal officials. See, *e.g.*, *Clemente* v. *Allen*, 120 F.3d 703, 705 (7th Cir. 1997) (per curiam) (citing cases from other circuits); *Martin* v. *Sias*, 88 F.3d 774, 775 (9th Cir. 1996) (per curiam) (same). Cf. *Antoine* v. *Byers & Anderson, Inc.*, 508 U.S. 429, 433 n.5 (1993) ("For purposes of immunity, we have not distinguished actions brought under 42 U.S.C. § 1983 against state officials from actions brought against federal officials."). The remedy for constitutional violations by state officials is an explicit one created by Congress, while the remedy for constitutional violations by federal officials is an implied one fashioned by this Court. Because the cause of action was developed in a common law manner, it is proper here that the elements of the cause of action be grounded in the common law.

a *Bivens* or Section 1983 cause of action is not a new claim, see, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992), and it is within the question presented, see Pet. (I).[12]

II. THERE WAS PROBABLE CAUSE FOR THE CHARGES AGAINST RESPONDENT

The court of appeals concluded, incorrectly, that the absence of probable cause is not an element of a First Amendment action for retaliatory prosecution, and thereby obviated the need to consider petitioners' argument that probable cause existed. See Pet. App. 12a. This Court could therefore leave that issue for consideration by the court of appeals in the first instance. If the Court reaches the issue, however, it is clear that there was probable cause for the charges.

A. Respondent was charged principally with conspiracy to defraud the United States, in violation of 18 U.S.C. 371. For a defendant to be guilty of conspiracy, there need not be a "formal agreement" to violate the law, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1946), and the defendant need not be aware of

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[12] Limiting the holding to the context of a *Bivens* cause of action could implicate a jurisdictional question about whether that issue is properly before the court of appeals on an interlocutory qualified immunity appeal. Although courts have provided different answers to that question, compare *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1082-1084 (8th Cir. 2005) (immediately appealable), petition for cert. pending, No. 04-1611 (filed May 31, 2005), and *Hill* v. *Department of the Air Force*, 884 F.2d 1318, 1320 (10th Cir. 1989) (same), cert. denied, 495 U.S. 947 (1990), with *Pelletier* v. *Federal Home Loan Bank*, 968 F.2d 865, 871 (9th Cir. 1992) (contra), the better view is that the issue is fairly included in the interlocutory appeal, see 04-1611 Br. in Opp. 6-10. In any event, the Court need only reach that jurisdictional issue if it limits its holding to the *Bivens*/Section 1983 context.

all the conspiracy's details or members, *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947). It is enough that there was a "tacit understanding," *Direct Sales Co.* v. *United States*, 319 U.S. 703, 714 (1943), and that the defendant had a "slight connection" to the conspiracy, *e.g.*, *United States* v. *Alvarez*, 358 F.3d 1194, 1201 (9th Cir.), cert. denied, 125 S. Ct. 126 (2004); *United States* v. *Strickland*, 245 F.3d 368, 385 (4th Cir.), cert. denied, 534 U.S. 894 (2001). Nor is it necessary that the existence of the conspiracy or the defendant's participation in it be proved "by direct evidence." *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Both elements "may be inferred from a 'development and a collocation of circumstances.'" *Ibid.* (quoting *United States* v. *Manton*, 107 F.2d 834, 839 (2d Cir. 1939), cert. denied, 309 U.S. 664 (1940)). That is particularly true of white-collar conspiracies, like this one, which are often established by "a complex web of inferential proof." *United States* v. *Ashfield*, 735 F.2d 101, 103 (3d Cir.), cert. denied, 469 U.S. 858 (1984).

A *charge* of conspiracy, of course, requires only probable cause, which is "more than bare suspicion," but "'less than evidence which would justify condemnation' or conviction." *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949) (quoting *Locke* v. *United States*, 11 U.S. (7 Cranch) 339, 348 (1813) (Marshall, C.J.)). Probable cause is a "commonsense, nontechnical conception[]" that deals with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas* v. *United States*, 517 U.S. 690, 695 (1996) (quoting *Illinois* v. *Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar*, 338 U.S. at 175)). This Court has stated that "[t]he substance of all the definitions" of the term is "a reasonable ground for be-

lief of guilt." *Carroll* v. *United States*, 267 U.S. 132, 161 (1925) (quoting *McCarthy* v. *De Armit*, 99 Pa. 63, 69 (1881)). Probable cause exists if "the facts and circumstances" about which there is "reasonably trustworthy information" are "sufficient to warrant a prudent man in believing that the [defendant] * * * committed * * * an offense." *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964).

B. The charges against respondent were contained in an indictment, the return of which is generally regarded as *prima facie* evidence of probable cause. See *Tinsley* v. *Treat*, 205 U.S. 20 (1907) (proceeding for removal of criminal defendant to district where he was charged); Restatement (Second) of Torts, *supra*, § 664(2), at 432 (common law action for malicious prosecution). On this record, respondent cannot rebut that evidence. There was indisputably a conspiracy involving Gnau's payment of kickbacks to Voss in exchange for his referral of business to GAI and Spartin's acceptance of a contract to search for a new Postmaster General while seeking to conceal his association with GAI and REI. It is also indisputable that REI stood to benefit from both schemes. The only question is whether respondent was a knowing member of the conspiracy. As explained below, the "collocation of circumstances," *Glasser*, 315 U.S. at 80 (quoting *Manton*, 107 F.2d at 839), was "sufficient to warrant a prudent man in believing" that he was, *Beck* v. *Ohio*, 379 U.S. at 91.

After Voss recommended that REI hire GAI, he called respondent several times and, on at least one occasion, asked why his recommendation had not been acted upon. Respondent, in turn, "kept pushing" Reedy, and told him not to "drop the ball." After REI hired GAI, Gnau told Reedy that it was better that he not know about Gnau's arrangement with Voss. Gnau also

told Reedy that they should refer to Voss as "our friend," and Reedy replied, "I understand." Reedy later denied—falsely—that he had gotten the GAI referral from Voss. Respondent's notes also suggest that respondent had access to information from closed sessions of the Postal Service's Board of Governors, of which Voss was a member. J.A. 41, 54-57, 79-82, 126; C.A. App. 414.

After the investigation began, the postal inspectors were informed that REI may have purged records. There were in fact a number of omissions in the records that REI produced, including respondent's "Postal" notebook, and REI's Frank Bray admitted that he had altered his travel records to conceal meetings with Spartin. In addition, one of respondent's notebooks included an entry suggesting that he might have coached REI employees on how to answer questions from postal inspectors, and respondent made comments consistent with that entry at a staff meeting. J.A. 60-62, 82, 85, 89-90, 172-173.

Finally, respondent provided an implausible explanation of his involvement in the recruitment of a new Postmaster General. He told the postal inspectors that, when Spartin called and asked for referrals, he did not believe that Spartin was recruiting a new Postmaster General, even though respondent gave Spartin the names of candidates and made an introductory call to one of them. Respondent and Spartin also agreed to say that it was respondent who had called Spartin, even though it was in fact Spartin who placed the call. J.A. 59, 85-86.

Voss's persistence in urging respondent to hire GAI suggested that Voss had a personal interest in the decision, and thus is evidence that respondent had knowl-

edge of the conspiracy. So, too, is the presence in respondent's notebook of information from closed sessions of the Postal Service's Board of Governors. The comments that Gnau made to Reedy also suggested an improper arrangement between Voss and Gnau, and thus are evidence that Reedy had knowledge of the conspiracy. Because respondent was Reedy's close associate, and because Reedy is known to have conveyed to respondent the substance of his discussion with Voss about GAI, see J.A. 54, it is reasonable to infer that Reedy told respondent at least some of what Gnau told Reedy about Gnau's relationship with Voss. In addition, Reedy's statement concealing the fact that it was Voss who had referred GAI and respondent's deceptive statement about the Postmaster General search are evidence of consciousness of guilt—and, by extension, of knowing membership in the conspiracy. See *Hickory* v. *United States*, 160 U.S. 408, 417 (1896). The same is true of the evidence that respondent altered or destroyed records, and of the evidence that he coached witnesses. See *ibid*

In expressing the view that "the evidence supporting the government's case * * * appears quite weak," Pet. App. 22a, the court of appeals suggested that some of the evidence had an innocent explanation, *id.* at 24a-25a. "The fact that an innocent explanation may be consistent with the facts alleged, however, does not negate probable cause." *United States* v. *Fama*, 758 F.2d 834, 838 (2d Cir. 1985). As this Court has explained, "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Gates*, 462 U.S. at 244 n.13.

C. Under principles of qualified immunity, petitioners were entitled to summary judgment even if, in fact

and in hindsight, there was *not* probable cause for the charges against respondent. As with "other officials who act in ways they reasonably believe to be lawful," qualified immunity protects law enforcement officials who "reasonably but mistakenly conclude that probable cause is present" from being held "personally liable." *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). Even if the evidence of respondent's guilt did not rise to the level of probable cause, it was not so one-sided that no reasonable person in petitioners' position could believe there was probable cause. That is especially true inasmuch as the final judgment as to the existence of probable cause rested with the prosecutors, who exercised independent judgment (and, of course, enjoy absolute immunity). Accordingly, if petitioners "erred in concluding that probable cause existed," they are still "entitled to qualified immunity because their decision was reasonable, even if mistaken." *Hunter* v. *Bryant*, 502 U.S. 224, 228-229 (1991) (per curiam).[13]

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[13] The fact that the district court entered a judgment of acquittal in the criminal case does not require a different conclusion. Even if, as the district court found, no rational trier of fact could find respondent guilty beyond a reasonable doubt, a reasonable law enforcement officer could believe that there was probable cause that respondent committed an offense. There is no inconsistency between the two determinations, because "[w]hatever evidence may be necessary to establish probable cause in a given case, * * * it never need rise to the level required to prove guilt beyond a reasonable doubt." *United States* v. *Watson*, 423 U.S. 411, 431 n.4 (1976) (Powell, J., concurring).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

MICHAEL HARTMAN *ET AL.*,

Petitioners,

v.

WILLIAM G. MOORE, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether law enforcement officials violate the First Amendment, and thus have no qualified immunity from suit, when they procure a criminal prosecution for the purpose of retaliating against an individual for his public criticisms of and lobbying against a government agency on matters of public concern, regardless of whether there is probable cause for the prosecution.

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BRIEF FOR RESPONDENT

It has long been settled that government officials violate the First Amendment if they subject an individual to adverse action in retaliation for the individual's public criticism of, and lobbying against, government policies. This is so even if, but for the retaliatory motive, the adverse action would have been objectively reasonable or otherwise appropriate. Petitioners contend, however, that where, as here, the improperly motivated action takes the form of the procurement of a criminal prosecution, *there is no First Amendment violation at all* if the prosecution was backed by probable cause, whether or not the officials actually thought there was probable cause and even if the prosecution would not otherwise have been brought. There is no basis in law, logic or policy for this unprecedented prosecution exception to the Constitution. Indeed, Petitioners' "unique rule" would result in virtually no protection from unconstitutionally motivated investigations and prosecutions, because the government will almost always be able to fabricate a colorable claim of probable cause. The Court should reject such a license to lawless conduct. By procuring Respondent's prosecution in retaliation for his speech, Petitioners violated the First Amendment and, as a result, are not entitled to qualified immunity from Respondent's suit for damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Moreover, even if the existence of probable cause could somehow remove the retaliatory procurement of a prosecution from the strictures of the First Amendment, this is not a case in which there was probable cause. Dramatic documentary evidence shows Petitioners themselves knew that there was no basis for believing Respondent to be guilty of a crime, and the record makes clear that no reasonable officer could have thought otherwise. For this reason, too, Petitioners are not entitled to qualified immunity from suit. The D.C. Circuit's holding affirming the district court's

denial of Petitioners' motion for summary judgment based on qualified immunity should therefore be affirmed.

STATEMENT OF THE CASE

Until the events at issue here, Respondent William G. Moore, Jr., had lived the American dream. The son of a Washington, D.C. fireman, Moore attended Georgetown University on a baseball scholarship, served with distinction in the Army, including service in Vietnam, and became a top-level executive in the high-tech industry. J.A. 335-36. In 1982, Moore was recruited to turn around Recognition Equipment Inc. ("REI"), a pioneer in optical-scanning technology that had fallen on hard times and was flirting with bankruptcy. J.A. 336-37. Within a year, Moore returned the company to profitability and increased its stock price more than six-fold. J.A. 337. Moore was widely acclaimed for REI's success, with *Forbes Magazine* opining that "[f]ew [corporate] turnarounds owe so much to a single executive." J.A. 337-38, 350-51. Along the way, Moore became chairman of the American Electronics Association, was named Dallas/Ft. Worth Businessman of the Year, and was appointed by President Reagan to serve on the Advisory Committee for Trade Negotiations. J.A. 338-39. Moore's seemingly unlimited prospects, however, were destroyed when the Postal Inspectors,[1] six officers of the United States Postal Service ("USPS" or "Postal Service"), subjected Moore to an unfounded criminal investigation, and procured his prosecution, in retaliation for Moore's criticism of, and lobbying against, the Postal Service and its senior management. Although Moore was easily acquitted upon motion at the end of the government's six-week case, his company and his career as a corporate executive were ruined.

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[1] As used herein, the term "Postal Inspectors" refers to Petitioners and Daniel Harrington, a defendant who died during the course of the lawsuit.

1. The Scanner Controversy. The events leading to Petitioners' retaliation against Moore revolved around a public debate over the Postal Service's decision to automate its mail-sorting processes by purchasing hundreds of millions of dollars of optical character-reading devices. In late 1983, Postmaster General ("PMG") William Bolger announced that the Postal Service would purchase foreign-designed single-line scanners, which were dependent upon use of nine-digit zip codes, rather than multi-line scanners of the sort designed and built in the United States by REI, which could be used effectively with five-digit zip codes. J.A. 340-41; Pet. App. 2a. This decision became a flash point with both the USPS Board of Governors and Congress. Pet. App. 3a. In 1984, Congress's Office of Technology Assessment ("OTA") concluded that the use of single-line scanners would cause over $1 million per day in operational losses. *Id.* Ultimately, when it became apparent that postal customers were not using nine-digit zip codes at the necessary levels, the Postal Service was forced to make a "mid-course correction" and employ multi-line scanners. *Id.* at 4a. As a result of the controversy, Bolger's successor, Paul Carlin, and other senior USPS managers who had supported single-line scanners were reassigned, fired or forced to retire. J.A. 202-04; *United States v. Recognition Equip. Inc.*, 725 F. Supp. 587, 598-99 (D.D.C. 1989).

2. Moore's Lobbying and Public Criticism of the USPS. Moore and REI were at the epicenter of the scanner controversy. Moore thought the decision to rely upon single-line scanners was unsound, and he unabashedly and aggressively took his case to PMG Bolger, the Board of Governors, Congress, and the public—as he was constitutionally entitled to do. Pet. App. 3a; J.A. 340-42. As a result of this lobbying, Moore persuaded Congressman Martin Frost to initiate the OTA study and, later, to introduce an amendment to an appropriations bill requiring the Postal Service to buy American multi-line technology. Pet. App. 3a; J.A. 342. Not surprisingly, Postal Service officials were

frustrated and angered by Moore's criticisms, came to view Moore as the enemy and, after the mid-course correction, were determined to prevent Moore and REI from obtaining the scanner contract. J.A. 190, 234-35, 347. One senior official even told REI that it would never get any USPS business so long as he was head of operations. J.A. 190.

3. Petitioners' Investigation of Moore's Political Activities. Motivated by hostility towards Moore for his role in the scanner-procurement controversy and aware that an indictment would make Moore and REI ineligible for the scanner contract, the Postal Inspectors launched a retaliatory criminal investigation. As early as December 1985—months before they uncovered the kickback scheme in which they would later attempt to implicate Moore—the Postal Inspectors prepared an "Investigative Strategies" memo that labeled Moore and REI as "coconspirators in a scheme to defraud the U.S. Postal Service," even though, as Petitioner Edwards later conceded, there was no evidence that any such conspiracy existed. J.A. 234.

Pursuant to this strategy, the Postal Inspectors scrutinized Moore's public criticisms and lobbying with no apparent regard for the First Amendment protection afforded to these activities. Pet. App. 21a-22a. They issued subpoenas for records of Moore's and REI's political contributions, "meetings with United States Congressmen," "articles placed with trade publications and reporters," and "interviews with journalists and reporters." Pet. App. 21a-22a; J.A. 431-39. They questioned REI officials about the company's lobbying efforts, political contributions, and fundraising; interrogated a congressional staffer about her congressman's assistance to REI; and even tried to dig up "dirt" to throw on REI's congressional supporters. J.A. 175, 234-37, 247-52, 394.

4. The Voss/Gnau Conspiracy. In late February 1986—after they had prepared the "Investigative Strategies" memorandum and begun to investigate Moore's and REI's

political and media activities—the Postal Inspectors discovered that Peter Voss, a member of the USPS Board of Governors, was receiving kickbacks from John Gnau, the principal of Gnau & Associates, Inc. ("GAI"). GAI was the politically well-connected consulting firm that REI had hired—on Voss's recommendation and through "an entirely normal process"—to assist with its lobbying efforts. Pet. App. 4a; J.A. 197-201. The Postal Inspectors learned that Voss and his administrative assistant, along with Gnau and two other GAI officials, including GAI's President, William Spartin,[2] were involved in the conspiracy. Pet. App. 4a; C.A. App. 304. Ultimately, three of the coconspirators pleaded guilty; the other two received immunity from prosecution in exchange for cooperation. Pet. App. 4a; J.A. 119.

The Evidence Exonerates Moore — The Postal Inspectors immediately saw the Voss/GAI conspiracy as an opportunity to tar Moore with criminal wrongdoing. The problem for the inspectors was that there was no probable cause to believe that Moore had participated in the conspiracy—and the Postal Inspectors knew it. Most significantly, though lacking any evident reason to protect Moore, none of the coconspirators ever implicated him. Pet. App. 25a; J.A. 208-10. The Postal Inspectors repeatedly urged the conspirators to do so, on occasion using "extraordinary" and improper pressure tactics, but again and again the conspirators each informed the inspectors that Moore was not involved. Pet. App. 25a. Voss even told the inspectors that there was "no way Moore knew" anything improper was occurring. Pet. App. 26a; *see also* J.A. 452 (noting Voss's exoneration of

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[2] Spartin had the dual role of President of GAI and managing partner of a subsidiary of an executive-search firm that had been hired by the Postal Service. The Postal Service was fully aware of this dual role, *see* J.A. 193, yet the Postal Inspectors subsequently claimed that Spartin fraudulently concealed his affiliation with GAI from the Postal Service.

Moore "after great reflection while sitting in a federal prison camp"). Faced with this reality, the Postal Inspectors conceded that their evidence showed only that REI, "*but not MOORE . . . individually*," might have been "aware of Voss' corrupt actions." J.A. 333 (emphasis added).

5. Petitioners' Retaliatory Efforts to Procure Moore's Indictment. Having, by their own admission, failed to find any evidence that Moore even knew of the conspiracy, let alone violated the law by joining it, the Postal Inspectors went to bizarre lengths and resorted to highly unusual and deceptive tactics to obtain Moore's indictment.

Petitioners' Retaliatory Intent — The Postal Inspectors candidly acknowledged in writing that the primary reason for their dogged pursuit of Moore and REI was Moore's effort to reverse, through lobbying and public criticism, the decision to employ single-line scanners. In a memorandum entitled "Arguments for Indicting the Corporation"—which the court of appeals described as "evidence of retaliatory motive . . . close to the proverbial smoking gun" (Pet. App. 28a)—the inspectors' *first* justification for indicting REI, which they described as being completely "*[i]ndependent of [the] Voss/GAI actions*," was that

> the corporation and its PAC funded a media and political campaign to discredit USPS management and cause financial harm to USPS, for example
> a. staged questions and testimony before Congress
> b. Frost amendment to freeze USPS appropriations bill.

J.A. 329-30 (emphasis added). In other words, Petitioners' *very first reason* for indicting REI was Moore's lobbying, in both Congress and the media, against the USPS scanner decision.

Likewise, in a "Details of Offense" memorandum they prepared for the U.S. Attorney to summarize the evidence, the Postal Inspectors treated Moore's lobbying and media activities as criminal. In that document, the inspectors described Congressmen Frost and Brooks, who were

instrumental in supporting REI and requesting the OTA study that criticized the Postal Service's scanner decision, as "key players" in Moore's purported offense. J.A. 325-26. The Postal Inspectors even wrote that Moore's alleged fraudulent intent was "evident" in the fact that "at Moore's and Reedy's suggestion and with their substantial input relative to its drafting, Congressman Frost proposed an amendment to a USPS appropriat[ions] bill that in effect would freeze USPS revenue until [multi-line scanners] were purchased from REI," and in the fact that "REI continued to undermine the competitive testing program via the media and Congress." J.A. 323-24; *see also* Pet. App. 21a.

Lobbying of, and Misconduct in, the U.S. Attorney's Office — In an unprecedented move, the Postal Inspectors aggressively lobbied the U.S. Attorney's Office on numerous occasions to advocate the indictment of Moore, REI and Robert Reedy, an REI vice-president. J.A. 242-43. Paul Knight and Charles Leeper, the Chief and Deputy Chief of Prosecutions, were not impressed, concluding that, while Moore and REI "played 'hardball' with the Postal Service," the evidence that Moore and Reedy had acted criminally or known about the payments to Voss was "not particularly strong," and the case against Moore was especially weak. J.A. 447, 453, 455; Pet. App. 26a. While this analysis might ordinarily have been sufficient to put a stop to a law enforcement officer's personal vendetta, the Postal Inspectors had the good fortune to be supported in their cause by an Assistant U.S. Attorney, Joseph Valder, with an improper agenda of his own. Specifically, Valder admitted during the course of the investigation—in the presence of, and without contradiction by, two of the Postal Inspectors—that "the merits of the case or whether [Moore] w[as] guilty or not did not concern him" because he just wanted to "win the case" and "get a track record or some notoriety which would help him obtain a good position in private practice." J.A. 442, 445-46. With the support of Valder, the Postal Inspectors continued to push for Moore's indictment, *see*

J.A. 242-43, 467-73, and, as a result of this "unusual prodding," the U.S. Attorney's office ultimately relented and approved the prosecution. Pet. App. 27a.

Misconduct Before the Grand Jury — Lacking probable cause, the Postal Inspectors "behaved . . . as if their case needed bolstering" by tampering with the grand jury process. Pet. App. 27a. Specifically, the inspectors went to improper and extraordinary lengths to keep the grand jury from hearing witnesses say that Moore was innocent—in violation of Justice Department guidelines requiring presentation of exculpatory evidence to the grand jury, *see* Department of Justice, *United States Attorneys' Manual* § 9-11.233 (1988). For example, certain coconspirators and other witnesses testified, not by way of ordinary questions and answers, but by reading carefully scripted statements that the Postal Inspectors prepared in order to prevent the witnesses from telling the grand jury that neither Moore nor anyone else at REI knew about the payments to Voss. J.A. 178-81, 211-13, 253-66. In one instance, Valder left a witness, Frank Bray, and his lawyer, now-district judge Ellen Huvelle, in the hands of the Postal Inspectors, who refused to permit Mr. Bray and Ms. Huvelle to correct the scripted statement that was to be read to the grand jury the next day. J.A. 266-74, 292-99, 374-79, 418-27; Pet. App. 27a.

The Postal Inspectors also attempted to coerce another witness, Spartin, into incriminating Moore, even taking the unprecedented step of participating in a preplanned ploy whereby as many as ten inspectors surrounded Spartin while his immunity agreement was torn in two. J.A. 217-18, 403-18. When Spartin refused to capitulate, the Postal Inspectors improperly showed him the scripted grand jury statements of his coconspirators in order to elicit an "opinion," contrary to his personal knowledge, that Moore knew that Voss was receiving money from Gnau; the inspectors then presented this "opinion" to the grand jury as evidence of Moore's guilt. Pet. App. 25a-26a; J.A. 221-24, 226, 380-92, 428-30.

These tactics had their desired effect: in reliance on the Postal Inspectors' distorted presentation of the case, the grand jury indicted Moore, Reedy and REI. The indictment satisfied a principal goal of the Postal Inspectors' retaliatory agenda by causing REI to be banned from participating in the scanner procurement and foreclosing REI's chances of obtaining the lucrative scanner contract. J.A. 244, 345.

6. Moore's Acquittal. With the Postal Inspectors' retribution complete, the house of cards they had constructed collapsed. After the government presented its case for six weeks, Moore, Reedy and REI filed motions for acquittal, which Judge Revercomb granted due to lack of evidence:

> The government's evidence is insufficient, even when viewed in the light most favorable to it, for a trier of fact to find guilt beyond a reasonable doubt. Much of what the government characterizes as incriminatory evidence is not persuasive of guilt when viewed in its full context. In fact, some of the government's evidence is exculpatory and points towards innocent conduct of the Defendants.

Recognition Equip., 725 F. Supp. at 587-88. There was, the court noted, a "complete lack of direct evidence to suggest that the Defendants knew of the illegal payoff scheme"; indeed, "[a]ll of the unindicted coconspirators who testified expressly stated that they never told Moore or Reedy about the payments from Gnau to Voss." *Id.* at 596. Consequently, even viewed in the light most favorable to the government, the government's evidence did not "support a reasonable inference that the Defendants knew" of the conspiracy they had allegedly joined. *Id.* at 589.

7. Moore's Lawsuit. Despite being acquitted, Moore was financially devastated by his wrongful indictment and prosecution. The mere fact of the indictment caused REI to be debarred from the scanner procurement, and Moore was suspended from REI pursuant to a "cleansing plan" that the Postal Inspectors formulated and imposed on REI. J.A. 244,

345. The publicly traded company that Moore had rescued from the brink of bankruptcy saw its fortunes decline, and it eventually was acquired by a smaller competitor, leaving Moore no job to return to after his acquittal. J.A. 346. Moore also suffered the career equivalent of the death penalty. Before his indictment, as a well-respected executive in the high-tech industry, Moore was on the path to become CEO of one of the nation's biggest technology companies. J.A. 346-47. As a result of the indictment, however, no company would even consider him for such a position. *Id.*

Moore sought compensation for these injuries, asserting in federal court in Texas, *inter alia*, a *Bivens* claim against the Postal Inspectors and Valder for violation of Moore's First Amendment rights. J.A. 46. In a separate action, Moore asserted, *inter alia*, a claim for malicious prosecution against the United States under the Federal Tort Claims Act ("FTCA"). Moore's lawsuits were transferred to the District of Columbia and consolidated. Valder was eventually dismissed from the case on the grounds of absolute prosecutorial immunity, Pet. Br. at 9, while Moore was permitted to conduct "limited discovery" that was "tailored to the issue of whether the postal inspectors had the requisite retaliatory motive." Mem. Op. of Feb. 5, 1998, at 29.

Following this limited discovery, Petitioners and the United States filed separate motions for summary judgment. Petitioners argued that they were entitled to qualified immunity on Moore's First Amendment claim because "Moore did not have a clearly established right to be free from all prosecution tinged by alleged retaliatory motive; he had a right to be free only from those prosecutions both tinged by retaliatory motive and that otherwise could not appropriately be brought." Mem. Supp. Postal Inspectors' Mot. Summ. J. at 25. Petitioners also argued that Moore had failed to come forward with sufficient evidence to create triable issues of fact on retaliatory motive and causation. *See id.* at 34-38. For its part, the United States argued that it was

entitled to summary judgment on Moore's FTCA claim for malicious prosecution because, *inter alia*, Moore could not establish the absence of probable cause, which the D.C. Circuit had earlier held was an element of the FTCA claim. *See* Mem. Supp. United States' Mot. Summ. J. at 11-17.

The district court denied both motions, finding that "[t]here are material[] facts in dispute." Pet. App. 42a.[3] Petitioners, but not the United States, appealed, limiting their argument—because of the interlocutory posture of the appeal—to the contention that they are entitled to qualified immunity from suit because Moore's rights were not violated. The court of appeals affirmed. It first concluded that circuit precedent established that a prosecution procured in retaliation for the exercise of free speech violated the First Amendment whether or not there was probable cause. Pet. App. 13a-14a. Explaining the rationale for this precedent, the court stated that this Court's decision in *Wayte v. United States*, 470 U.S. 598 (1985), made clear that a decision to prosecute could not be based on the exercise of constitutional rights. The court also found support for its logic in *Crawford-El v. Britton*, 523 U.S. 574 (1998), citing that decision's holding that governmental officials acting with constitutionally improper motives are not entitled to immunity just because the retaliatory conduct is objectively reasonable. Pet. App. 19a. "Other constraints identified in *Crawford-El*—procedural mechanisms for limiting discovery and facilitating summary judgment, as well as the

[3] The district court's decision means that the record is sufficient to permit a reasonable jury to conclude that Petitioners' actions were taken to retaliate against Moore for his speech and lobbying activities and that the prosecution would not have occurred but for that improper motive. In addition, by rejecting the United States' motion for summary judgment, the district court necessarily found the record sufficient to permit a fact-finder to conclude that there was no probable cause to prosecute Moore.

opportunity to show the prosecution would have happened anyway—may screen out baseless motive claims without precluding recovery in cases where officers pursue retaliatory charges they would not have undertaken but for their unconstitutional animus." *Id.* (citations omitted).

The court of appeals emphasized that its holding was "limited," however, because the existence of probable cause will usually be sufficient to establish that the prosecution would have occurred in any event, thereby breaking the chain of causation. Pet. App. 19a. The instant case, by contrast, constitutes a "rare circumstance" where there was both "strong evidence of retaliatory motive" (*id.* at 20a) that "comes close to the proverbial smoking gun" (*id.* at 28a) and "weak indicators of probable cause" (*id.* at 20a) coupled with other considerations (such as complexity and cost) "that, under normal circumstances, might weigh against prosecuting a marginal case" (*id.* at 28a). As a result, the court was unable to conclude that Moore would have been prosecuted but for Petitioners' desire to retaliate against his speech and lobbying. *Id.*

Finally, in a portion of its holding not before this Court, *see infra* note 7, the court of appeals held that Moore's First Amendment right to be free from retaliatory prosecution, even if backed by probable cause, was clearly established in the D.C. Circuit at the time of Petitioners' misconduct. Pet. App. 29a-31a. As a result, Petitioners had fair warning that their conduct was unconstitutional and accordingly were not entitled to immunity from suit. Because the court of appeals denied the qualified-immunity defense on this basis, it did not reach the question whether, contrary to the conclusion of the district court (*see supra* p. 11 & note 3), there had been probable cause to prosecute Moore. Pet. App. 12a.

SUMMARY OF THE ARGUMENT

This case presents a narrow and straightforward question: does the First Amendment forbid law enforcement officials

from procuring an indictment and prosecution that would not otherwise have been brought for the purpose of retaliating against an individual's lobbying and public criticisms of the government, regardless of whether there is probable cause for the prosecution? If it does, then Petitioners violated Moore's clearly established First Amendment rights, and the courts below properly rejected Petitioners' qualified-immunity defense. Moreover, even if the First Amendment protects against such conduct only in the absence of probable cause, Petitioners are still not entitled to qualified immunity because they did not believe—and no reasonable officer could have believed—that there was probable cause.

1. It has long been settled that the First Amendment right to freedom of speech is violated when the government subjects an individual to adverse action in retaliation for his public criticisms of, and lobbying against, government policy, even if the adverse action would have been proper if taken without retaliatory purpose. As this case comes before the Court, it must be assumed—as the record evidence confirms—that Petitioners targeted Moore because of his speech and that Moore would not have been prosecuted but for Petitioners' retaliatory motive. Because this retaliation was patently unreasonable in light of the well-established First Amendment prohibition against it, Petitioners are not entitled to qualified immunity.

2. This conclusion is not altered by the fact that Petitioners' retaliation took the form of the procurement of a criminal prosecution. If the Constitution generally prohibits the government from acting by reason of an unconstitutional motive even if it could have taken the same action absent that illicit intent, as is unquestionably the case, then it makes no sense to say that the existence of a constitutional violation depends on the specific nature of the improperly motivated act. That is why this Court's precedents make clear that the decision to bring a prosecution backed by probable cause—like any other official decision—may not be based on a

constitutionally prohibited reason like race or the exercise of free-speech rights. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), this Court rejected as "unprecedented" the absolutist proposal to confer qualified immunity for unconstitutionally motivated conduct that would have been valid absent an illicit purpose, and it should likewise reject Petitioners' more radical assertion that such conduct does not violate the Constitution.

None of Petitioners' arguments to the contrary has merit. Petitioners contend that First Amendment violations should be treated the same way as racially motivated prosecutions under the Equal Protection Clause, and that precedents concerning the latter require, as a "screening mechanism," "some objective showing" equivalent to the absence of probable cause. That is incorrect. This Court's Equal Protection precedents establish that a racially discriminatory prosecution violates the Constitution *even if the prosecution is supported by probable cause*. Those precedents similarly show that what Petitioners characterize as an objective screening mechanism is nothing more than the well-settled requirement, applicable in both the Equal Protection and First Amendment contexts, that, for there to be a constitutional violation, the constitutionally prohibited animus, rather than some other factor such as neutral application of the law, must be the reason for the prosecution. Any contrary conclusion would represent a radical departure from settled law. Particularly in light of the ease with which law enforcement officers can uncover probable cause in the conduct of virtually everyone, Petitioners' rule would give government officials a license to discriminate and retaliate against individuals based on their protected political speech and their race.

Nor, contrary to Petitioners' contention, should the First Amendment right to be free from a retaliatory prosecution be defined by reference to the common-law tort of malicious prosecution. While the common law is sometimes used to

interpret terms of art used in the Constitution, and in some circumstances may also be relevant to the scope of *remedies* available under *Bivens* and 42 U.S.C. § 1983, the contours of specifically enumerated constitutional rights do not depend upon the technical niceties of torts recognized at common law. It is therefore completely at odds with this Court's settled approach to constitutional interpretation to search for a common-law tort analogy to the particular method used to deprive an individual of his constitutional rights and to then use the definition of that common-law tort to contract the scope of *the constitutional right itself.* The tort of malicious prosecution has nothing to do with—and therefore can shed no light on the meaning of—the right to freedom of speech.

Finally, Petitioners put forth a series of policy arguments relating to the relative competency of the judicial and executive branches and the need for a substantive rule of constitutional law that will avoid undermining prosecutorial effectiveness and chilling law enforcement. None of these policy considerations warrants reversal here because numerous adequate safeguards already exist to weed out non-meritorious claims and protect law enforcement officials from frivolous claims. Indeed, the Court in *Crawford-El* squarely held that similar policy concerns do not justify even a narrower *procedural* "screening mechanism" in a context where the potential litigation burdens on public officials are far greater than those present here.

3. There is also no merit to Petitioners' alternative rationale, offered only in passing, that the decision below should be reversed because the absence of probable cause is an element of the claim for damages authorized by *Bivens*. As Petitioners concede, this argument—which was not raised below and is outside the scope of the Petition for Certiorari—has nothing to do with their qualified-immunity defense or the scope of the First Amendment right at issue, but rather is a separate and distinct argument about the availability of a damages remedy for the violation of that

right. Because this is an interlocutory appeal under the "collateral order" doctrine, the Court lacks pendent appellate jurisdiction to address that separate argument.

In any event, the absence of probable cause is not an element of Moore's *Bivens* claim for violation of the First Amendment. Petitioners' argument rests on the mistaken assertion that this claim must slavishly incorporate the elements of the common-law tort of malicious prosecution. To the contrary, while the common law may sometimes provide guidance for shaping the remedy available under *Bivens* and § 1983, this is so only where the interests protected by a particular branch of the common law of torts parallel closely the interests protected by the constitutional right at issue. Because the interests protected by the First Amendment—freedom from punishment meted out *because of* one's speech—are fundamentally different than those protected by the common-law tort of malicious prosecution—protection from *unjustifiable* prosecutions—there is simply no warrant for relying on the malicious prosecution tort to shape the contour of the constitutional tort remedy for the First Amendment violation at issue here.

4. Even if Petitioners were correct that they *would be* entitled to qualified immunity *if* probable cause existed, they would still not be entitled to immunity here because they did not believe—and no reasonable officer could have believed—that there was probable cause to prosecute Moore. Although this Court should leave this issue, which was not decided below, for the court of appeals on remand, if it chooses to reach it, a review of the record shows that the pieces of disputed and ambiguous "evidence" cobbled together by Petitioners do not support the inference that Moore even knew of—let alone violated the law by agreeing to join—the conspiracy in which he allegedly took part, especially when that purported evidence is viewed together with the exculpatory evidence that Petitioners deliberately concealed from the grand jury.

ARGUMENT

The court of appeals properly affirmed the denial of Petitioners' motion for summary judgement based on the defense of qualified immunity. The court correctly held that the First Amendment protects the right to be free from otherwise valid official acts taken in retaliation for political speech and lobbying, and that this right extends to freedom from a retaliatory criminal investigation and procurement of a prosecution that would not otherwise be brought, whether or not the prosecution is backed by probable cause. Because there is no basis in law, logic or policy for creating a "unique rule" of First Amendment law in the context of retaliatory investigations and prosecutions, and because, in any event, there was no probable cause for the charges against Moore, Petitioners are not entitled to summary judgment.

I. PETITIONERS VIOLATED MOORE'S FIRST AMENDMENT RIGHTS BY RETALIATING AGAINST HIM FOR HIS PUBLIC CRITICISMS OF, AND LOBBYING AGAINST, THE U.S. POSTAL SERVICE

1. There is no question that Moore's efforts to change Postal Service policy through public criticism and political lobbying, *see supra* pp. 3-4, fall squarely within the core of activities protected by the First Amendment. *See, e.g.*, *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). There is also no question that the evidence in this case presents a chilling picture of law enforcement agents who went on an investigative rampage to turn Moore's public criticisms of their agency into reasons to indict him. *See supra* pp. 4-9. Indeed, as the court of appeals observed, the "evidence of [Petitioners'] retaliatory motive comes close to the proverbial smoking gun." Pet. App. 28a.

It is also settled that the First Amendment does more than merely disable Congress from directly regulating protected speech; it also prohibits government officials from subjecting

a citizen to adverse action in "retaliation for protected speech." *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998). As the Court has explained, "such retaliation offends the Constitution [because] it threatens to inhibit exercise of the protected right." *Id.* at 588 n.10.[4] And retaliation for protected speech violates the Constitution even if the adverse action would have been legitimate if taken for different reasons. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977) (although teacher was terminable at will, his rights were violated "if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms"); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons," the benefit may not be denied "because of his constitutionally protected speech").

These principles, moreover, are simply applications in the First Amendment context of the general rule that any official act that would be proper if taken without an illicit motive will violate the Constitution if it is taken with a constitutionally prohibited motive. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65

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[4] *See also Rutan v. Republican Party*, 497 U.S. 62, 75 n.8 (1990) ("the First Amendment [protects against] even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights" (internal quotation marks omitted)); *Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights"); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 574 (1968); *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958).

(1977).[5] Notably, these principles have been directly applied to criminal prosecutions. *See, e.g., Wayte v. United States*, 470 U.S. 598, 608 (1985) ("the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights" (citations and internal quotation marks omitted)); *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (same); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("We of course agree . . . that the Constitution prohibits selective enforcement of the law based on considerations such as race.").[6]

2. In light of this settled law, no officer could reasonably have believed it consistent with the First Amendment to investigate Moore and procure his prosecution in retaliation for protected political speech, whether or not there was probable cause for the prosecution. *See Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) ("anyone who takes an oath of office knows—or should know—that" it is wrong to retaliate against an individual for exercising his constitutional rights). As a result, Petitioners are not entitled

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[5] As the court below recognized, an unconstitutionally motivated act is not invalid if the same act would have been taken had the impermissible purpose not been considered. Pet. App. 19a-20a; *Mt. Healthy*, 429 U.S. at 287; *Arlington Heights*, 429 U.S. at 270 n.21. Of course, arguing, as Petitioners do here, "that the same decision would have been *justified* . . . is not the same as proving that the same decision would have been *made*." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995) (emphasis added, internal quotation marks omitted, ellipsis in original).

[6] The lower courts, too, have long recognized that retaliatory prosecution violates the Constitution "*regardless* of whether valid convictions conceivably could be obtained." *Lewellen v. Raff*, 843 F.2d 1103, 1109-10 (8th Cir. 1988) (internal quotation marks omitted); *see also* Pet. App. 12a-15a; *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1072 (9th Cir. 2004); *Smith v. Meese*, 821 F.2d 1484, 1491-92 & n.5 (11th Cir. 1987); *Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir. 1981).

to qualified immunity from Moore's *Bivens* claim. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987).[7]

This Court's decision in *Crawford-El* makes clear, moreover, that the doctrine of qualified immunity would not protect Petitioners even if they could show—contrary to the record evidence, *see infra* Part IV—that there was probable cause to prosecute Moore. *Crawford-El* involved a claim by a prisoner that his belongings had been diverted to a family member in retaliation for protected speech. 523 U.S. at 574. Notwithstanding the trivial nature of this alleged "deprivation," the undeniable problem of frivolous prisoner litigation and the burden placed on prison officials responding to accusations of improper motive, the Court refused to impose any special heightened pleading or proof standards for motive-based constitutional tort claims. *Id.* at 592-97. The Court held further that an officer defending against such claims is not entitled to qualified immunity simply because the officer's conduct was "objectively valid, regardless of improper intent." *Id.* at 594 (internal quotation marks omitted); *see also id.* at 602 (Rehnquist, C.J., dissenting) (reasoning that officer should not be entitled to immunity if plaintiff can show through objective evidence that alleged lawful reason for officer's action "is actually a pretext"). The creation of such screening devices to protect officers against motive-based claims, the Court concluded, would improperly impede the vindication of First

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[7] Appropriately relying on circuit precedent, *see Hope v Pelzer*, 536 U.S. 730, 741-46 (2002); *United States v. Lanier*, 520 U.S. 259, 268-69 (1997), the court of appeals held that, at the time of Petitioners' conduct, Moore's right to be free from a retaliatory prosecution, whether or not backed by probable cause, was clearly established in the D.C. Circuit, where the conduct occurred. Pet. App. 29a-31a. Because this Court limited its grant of certiorari to the first question presented, *see* 125 S. Ct. 2977 (2005) (Mem.); Pet. at I, the correctness of this aspect of the decision below is not at issue here.

Amendment rights through constitutional tort actions. *Crawford-El*, 523 U.S. at 594-95. For the same reason, no special rule of immunity can be justified here. Just as the objective reasonableness of the defendant's acts in *Crawford-El* did not entitle her to qualified immunity from the prisoner's claim that the acts were taken with an unconstitutional motive, so, too, the alleged objective reasonableness of Petitioners' acts here (measured by whether there was probable cause to prosecute Moore) does not entitle them to qualified immunity from Moore's claim that he was prosecuted in retaliation for his protected speech.

II. THE PROCUREMENT OF A PROSECUTION IN RETALIATION FOR PROTECTED SPEECH VIOLATES THE FIRST AMENDMENT EVEN IF THERE IS PROBABLE CAUSE

Petitioners do not challenge the general rule, discussed above, that the First Amendment is violated when government officials take otherwise valid adverse action against an individual in retaliation for speaking and lobbying about matters of public concern. Indeed, Petitioners appear to concede, as they must, that they would have violated the First Amendment if they had, for the same retaliatory reasons that motivated their procurement of Moore's indictment, directly barred Moore from competing for Postal Service business (which, as noted above, *see supra* pp. 4, 9, was a principal objective of their retaliation), *cf. Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 678-79 (1996), or even if they had simply misdirected his mail, *cf. Crawford-El*, 523 U.S. at 578. Yet, according to Petitioners, because their retaliation constituted the more egregious act of procuring a criminal prosecution, *there was no First Amendment violation at all* if probable cause existed. As Petitioners concede, their argument boils down to a plea for a "*unique rule* [of First Amendment law] *in the prosecutorial context*." Pet. Br. at 31 (first emphasis added).

As an initial matter, Petitioners completely fail to reconcile their proposed rule with this Court's refusal in *Crawford-El* to immunize motive-based First Amendment violations merely because the challenged action would have been objectively valid if taken without improper intent. *See supra* pp. 20-21. Petitioners contend that *Crawford-El* is inapposite because it rejects a *procedural* rule of qualified immunity to protect officials from motive-based constitutional claims, while here Petitioners seek to shield officials from such claims by modifying the *substance* of the First Amendment to authorize speech-based retaliation in the prosecutorial context. *See* Pet. Br. at 34 n.9; Cert. Reply at 2-3. This argument is premised on the strange notion that concerns about litigation burdens on government officials somehow justifies judicial alteration of the substantive scope of the First Amendment even though the Court has held that those very same concerns do not justify altering judge-made standards of qualified immunity that are based, in part, on common-law principles. In fact, it should go without saying that justifications that are insufficient to alter the elements of a judge-made qualified-immunity defense cannot possibly suffice to alter the commands of the Constitution.[8]

Petitioners' argument is also conceptually incoherent. Because the Constitution prohibits the government from acting with an unconstitutional motive even if it could have done the same thing absent that illicit intent, it makes no sense to say that the existence of a constitutional violation

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[8] Petitioners nevertheless expressly disclaim any argument that the Court should revisit *Crawford-El* or create an exception, in the prosecution context, to its holding. *See* Pet. Br. at 34 n.9; Cert. Pet. Reply at 2-3. As a result, such arguments may not be invoked as a basis for reversing the decision below. *See Hagen v. Utah*, 510 U.S. 399, 410 (1994) ("we see no reason to consider an argument that petitioner not only failed to raise, but also expressly refused to rely upon in seeking a writ of certiorari").

depends on the specific nature of the improperly motivated act. Unsurprisingly, Petitioners fail to cite any case even suggesting that an unconstitutional-motive claim should be analyzed in this novel manner. *Cf. Umbehr*, 518 U.S. at 678 ("if [a state entity] had exercised sovereign power against [an individual] as a citizen in response to his political speech, it would be required to demonstrate that its action was narrowly tailored to serve a compelling governmental interest"). Moreover, Petitioners completely miss the mark in arguing (Pet. Br. at 33-34) that precedents such as *Mt. Healthy* prohibiting improperly motivated public-employment decisions do not provide appropriate guidance in the context of retaliatory investigations and prosecutions. To the extent there is a relevant distinction, it cuts *against* Petitioners, because, with respect to the authority to restrict speech, "the government as employer . . . has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality op.); *see also Umbehr*, 518 U.S. at 676-78.

Moreover, by focusing on the special considerations purportedly applicable to a prosecutor's decision to bring a case, Petitioners ignore the fact that the misconduct at issue in this case primarily involves the investigatory activities of law enforcement officers whose improper acts preceded (and perverted) the decision to prosecute. In all events, even with respect to decisionmaking by prosecutors, Petitioners' proposed "unique rule" is directly foreclosed by precedents of this Court. These teachings make clear that, like any other exercise of official discretion, the decision to prosecute is "subject to constitutional constraints," *United States v. Batchelder*, 442 U.S. 114, 125 (1979), and "may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights," *Wayte*, 470 U.S. at 608 (citations and internal quotation marks omitted); *see also supra* pp. 18-19.

Petitioners nonetheless offer three reasons for denying constitutional protection to an officer's improperly motivated investigation and procurement of a criminal prosecution for which there is claimed to be probable cause: (1) an alleged need to reconcile the Court's First Amendment jurisprudence with its Equal Protection jurisprudence (Pet. Br. at 21-24); (2) the fact that the absence of probable cause is an element of the common-law tort of malicious prosecution (*id.* at 24-30); and (3) the purported need to protect the exercise of prosecutorial discretion from judicial review (*id.* at 19-21, 30-34). All of these reasons lack merit.

1. The fundamental premise of Petitioners' argument is that the First Amendment standards governing prosecutions procured because of a citizen's speech should be the same as the Equal Protection standards governing prosecutions brought because of a citizen's race. Pet. Br. at 21-24. As Petitioners aptly state, "[t]here is no basis for treating these similar types of constitutional challenges to prosecution so differently." Pet. Br. at 23. Petitioners then make the astonishing contention that, in the context of racial discrimination under the Equal Protection Clause, a minority "claimant cannot establish selective prosecution merely by showing that his race was the but-for cause of the prosecution," but rather, under *United States v. Armstrong*, 517 U.S. 456 (1996), must make some "objective" showing in addition to the fact that he has been singled out for adverse action solely because of his race. Pet. Br. at 15. Building on the "premise" that prosecutions brought for no reason other than racial animus do not constitute Equal Protection violations, Petitioners then argue that prosecutions procured for no reason other than punishing constitutionally protected speech do not violate the First Amendment, unless the claimant can also "objectively" show the absence of probable cause.

It is quite clear, however, that a racially motivated criminal prosecution does violate the Equal Protection

Clause *even if the prosecution is supported by probable cause*. As far back as *Yick Wo v. Hopkins*, for example, this Court found a substantive violation of the Equal Protection Clause based on racially motivated prosecutions of individuals who had indisputably violated a facially neutral and reasonable law prohibiting laundries from operating in dangerous wooden buildings without a license. 118 U.S. 356, 373-74 (1886). Similarly, *Armstrong* expressly relied on *Yick Wo* and discussed the requirements of an Equal Protection Claim in a context where it was undisputed (and indisputable) that there was probable cause for the drug prosecutions at issue. *See* 517 U.S. at 458-59. Thus, it is the *adoption* of Petitioners' "unique rule" which would destroy the current symmetry between the First Amendment and the Equal Protection Clause in the prosecutorial context.

In contrast, the decision below creates no disconnect between the standards governing racially discriminatory prosecutions and those governing speech-based retaliatory prosecutions because, contrary to Petitioners' mind-boggling proposition, a deliberate policy of prosecuting citizens of only one race for certain crimes *would* violate the Equal Protection Clause. Petitioners blithely assert that *Armstrong* creates a special Equal Protection rule in the context of criminal prosecutions permitting race-based discriminatory treatment absent some additional "objective showing" equivalent to the absence of probable cause. Pet. Br. at 24. But *Armstrong* clearly held that "the decision whether to prosecute may not be based on 'an unjustifiable standard such as race,'" 517 U.S. at 464 (quoting *Oyler*, 368 U.S. at 456). *Armstrong* even makes clear that its analysis is based, not on any special rules for the prosecutorial context, but on "ordinary equal protection standards." *Id.* at 465 (quoting *Wayte*, 470 U.S. at 608). This is why *Armstrong* justified its ruling by extensively analyzing and applying the analysis in *Hunter v. Underwood*, 471 U.S. 222 (1985), and *Batson v. Kentucky*, 476 U.S. 79 (1986)—two ordinary Equal

Protection cases outside the criminal prosecution context. 517 U.S. at 467-68.

To be sure, as Petitioners note, *Armstrong* held that "[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." *Id.* at 465. But, as the opinion itself noted, this "similarly situated requirement" is one of the "ordinary equal protection principles" under which a showing of discriminatory effect is a prerequisite to showing differential treatment *based on race*. *Id.* At the risk of belaboring the obvious, racial-minority claimants cannot plausibly show that they have been treated differently because of their race if similarly situated non-minority individuals were treated in the same way. If San Francisco had applied its municipal ordinance to non-Chinese laundry operators in numbers proportionate to adversely affected Chinese operators, or if a proportionate number of white voters had been excised from Tuskegee, Alabama through its redrawing of municipal boundaries, then the plaintiffs in the seminal cases of *Yick Wo* and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), would have had no claim of race-based disadvantage. Similarly, the fact that the government prosecutes an individual of a particular race does not suggest that the prosecution was brought because of that individual's race; a showing of differential, more favorable treatment of persons of a different race is required in order to conclude that a discriminatory purpose was the reason for the prosecution.[9]

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[9] The need for such evidence of "discriminatory effect" is particularly obvious where, as in *Armstrong*, the claimant alleges a clear *pattern* of discriminatory prosecutions. *Cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 334-36 (1977). "This is not to say," however, "that a consistent pattern of official racial discrimination is a necessary predicate to a violation of the Equal Protection Clause" because "a single invidious

For this reason, under standard Equal Protection analysis applicable in all contexts, a showing of discriminatory effect is generally an "important starting point" for showing that the adverse action furthered a discriminatory purpose. *Arlington Heights*, 429 U.S. at 266. *Armstrong* simply applies this general principle to the prosecution context by requiring evidence of discriminatory effect to establish the constitutional violation, *i.e.*, that there has been purposely disadvantageous treatment because of race. It does not impose some *additional* "screening mechanism" (Pet. Br. at 22) on top of the normal Equal Protection showing that claimants must satisfy to establish a constitutional violation in the prosecutorial context.[10] Stated another way, the absence of such effect renders irrelevant any alleged racial prejudices held by prosecutors because any such *animus* has not been translated into negative government *action* based on race, so there is no point in inquiring further into the circumstantial evidence of racial prejudice.

Petitioners do not, of course, seek to transfer the "discriminatory effect" requirement of Equal Protection law to the First Amendment context where it has never been applied, because viable First Amendment claims, unlike *equal* protection challenges, are not necessarily or typically

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discriminatory governmental act" is impermissible, even if the government actors refrained from "such discrimination in making other comparable decisions." *Arlington Heights*, 429 U.S. at 564 n.14.

[10] Any ambiguity on this point is eliminated by the fact that the *Armstrong* Court reserved, at the United States' urging, the question "whether a defendant must satisfy the similarly situated requirement in a case 'involving direct admissions by [prosecutors] of discriminatory purpose.'" 517 U.S. at 469 n.3 (quoting Brief for United States at 15). The fact that the Court did so further establishes that the "similarly situated" requirement was imposed as an evidentiary prerequisite to finding that the prosecution was based on race, not as an additional objective "screening mechanism" in the prosecutorial context.

premised on *unequal* treatment. As the Court noted in *Crawford-El*, there is an obvious difference between an Equal Protection violation—involving an "intent to disadvantage all members of a class that includes the plaintiff"—and a First Amendment violation, such as the one in this case, where the government acts with the intent of "deterring public comment on special issues of public importance." 523 U.S. at 592. In the latter type of situation, where a lone whistleblower or lone public critic (like Moore) has been singled out for mistreatment because of a retaliatory animus directed specifically at him and under circumstances peculiar to him, there often are no "similarly situated" individuals and, more generally, it would be difficult to even articulate what is meant by "discriminatory effect" in this context. Accordingly, to ensure that the improper animus was translated into government action in these situations, courts generally require, as the court below required here, evidence that the claimant would not have been punished but for his protected speech. Pet. App. 15a-16a, 28a. This element of causation serves the same purpose in a First Amendment case of individualized retaliatory animus that the "similarly situated" requirement serves in a case of alleged systematic racial discrimination: both showings establish that the challenged conduct is "attribut[able] . . . to improper consideration of a discriminatory purpose." *Arlington Heights*, 429 U.S. at 270 n.21. No other "objective showing" is required—and certainly not one (the absence of probable cause) that, as explained above, has *never* been a prerequisite for an Equal Protection violation.

As the foregoing analysis shows, acceptance of Petitioners' interpretation of *Armstrong*, and its "extension" to the First Amendment context, would be at war with fundamental constitutional norms. Petitioners' rule would provide a license for federal and state law enforcement officers and prosecutors to single out political opponents or racial minorities for retaliatory or racially motivated investigations and prosecutions. As Petitioners themselves

candidly concede, there is no empirical basis for assuming "that almost all potential prosecutions that satisfy the probable cause standard are, in fact, brought," because, for "less serious" crimes, a "finding of probable cause would be far from a sufficient basis for expending prosecutorial resources." Pet. Br. at 32; *see also* Robert Jackson, *The Federal Prosecutor*, Address Delivered at the Second Conference of United States Attorneys, April 1, 1940 ("With the law books filled with a great assortment of crimes, [there] is a fair chance of finding at least a technical violation of some act on the part of almost anyone."). Consequently, under Petitioners' rule, the government could, free from any constitutional restraint, engage in a naked policy of prosecuting only political opponents of the President or the District Attorney for those less serious offenses that are normally not prosecuted. In the Equal Protection context, it would authorize investigators and prosecutors to engage in a pattern of official harassment of minority neighborhoods, through selective prosecution for minor offenses that are tolerated in white enclaves.

In short, Petitioners' rule would "permit[] and encourage[] an arbitrary and discriminatory enforcement of the law" by "furnish[ing] a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (internal quotation marks omitted). And there is no reason to think it would stop there: if the Court accepts Petitioners' invitation to determine the existence of a motive-based constitutional violation by reference to the context in which the improperly motivated act occurs, courts will have to confront whether a multitude of other improperly motivated core executive functions—such as discriminatory or retaliatory decisions to arrest, to audit tax returns, and to impose prison discipline—are similarly outside the scope of the Constitution's prohibitions whenever they would have been objectively

valid if taken for other reasons. The Court should not open the door to authorizing such political and racial profiling.

2. Petitioners also contend that the First Amendment right to be free from a retaliatory prosecution should be defined by reference to the common-law tort of malicious prosecution. In Petitioners' view, because the absence of probable cause is generally an element of that tort, probable cause must be absent for a retaliatory prosecution to violate the First Amendment. Pet. Br. at 24-30.

Moore, however, is not asserting a malicious prosecution claim against Petitioners, and Petitioners' argument ignores this Court's repeated admonitions against conflating the differing and distinct obligations of the Constitution and state tort law. Specifically, just as the commission of a common-law tort does not necessarily rise to the level of a constitutional violation simply because the tortfeasor is a government official, *see, e.g.*, *Daniels v. Williams*, 474 U.S. 327, 332-33 (1986); *Baker v. McCollan*, 443 U.S. 137, 146 (1979), so too do the contours of specifically enumerated constitutional rights not depend upon the technical niceties of torts recognized at common law. Rather, "[t]he validity of the claim [for deprivation of a constitutional right] must . . . be judged by reference to the specific constitutional standard which governs that right"—here the standards governing the right to freedom of speech. *Graham v. Connor*, 490 U.S. 386, 394 (1989); *see also Bivens*, 403 U.S. at 394 ("The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile."); *Albright v. Oliver*, 510 U.S. 266, 277 n.1 (1994) (Ginsburg, J., concurring) (explaining that constitutional rights are "not tied to the formal categories and procedures . . . of the common law"). "It is no reflection on either the breadth of the United States Constitution or the importance of

traditional tort law to say that they do not address the same concerns." *Daniels*, 474 U.S. at 333.

To be sure, this Court has, at times, looked to the common law in attempting to determine the content of constitutional provisions, including the First Amendment. *See* Pet. Br. at 28 & n.7 (citing cases). But Petitioners fundamentally misconstrue the nature of this endeavor. It is one thing, and entirely appropriate, to look to the common law to determine the contemporaneous understanding of particular terms of art used in the Constitution, such as "freedom of speech." *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring in the judgment). But it is quite another thing entirely, and completely inconsistent with this Court's settled approach to constitutional interpretation, *see supra* pp. 22-23, to search for a common-law tort analogy to the specific method that happened to be used to effect a particular deprivation of constitutional rights and to then use that analogy to contract the scope of *the constitutional right itself.* That is why, for example, the Court recognized in *Mt. Healthy* that a retaliatory discharge violates the First Amendment even where it does not constitute a wrongful termination under the common law. 429 U.S. at 283-84; *see also Bivens*, 403 U.S. at 394 & n.7 (explaining that limitations of liability for common-law trespass do not restrict the scope of the Fourth Amendment right). In short, the common-law tort of malicious prosecution has absolutely nothing to do with—and therefore can shed no light on the meaning of—the freedoms protected by the First Amendment.

Heck v. Humphrey, 512 U.S. 477 (1984), on which Petitioners rely, is not to the contrary. The question in *Heck* was whether a cause of action for damages pursuant to § 1983 could be brought for an allegedly unconstitutional conviction that had not been expunged. *Id.* at 486. Although the Court looked to the "favorable termination" element of the common-law tort of malicious prosecution for guidance,

it did so only in determining the scope of the constitutional tort remedy, and not in connection with any question about the scope of any constitutional right. *See Illinois v. Gates*, 462 U.S. 213, 223 (1982) ("The question whether [a] remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the . . . rights of the party seeking to invoke the [remedy] were violated by police conduct."); *Mt. Healthy*, 429 U.S. at 279, 281 (distinguishing between claim that defendant had immunity from suit and claim that defendant could not be liable under § 1983); *City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478, 1489 (2005) ("[t]he substantive questions whether the plaintiff has any right or the defendant any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is" (internal quotation marks omitted)). Accordingly, *Heck* has no bearing at all on the question at issue here, *i.e.*, whether an improperly motivated prosecution violates the Constitution if it is backed by probable cause. (That is why the Court was able to set forth the elements of an Equal Protection violation in the context of prosecutions in *Armstrong* without any reference to the common law or citation to *Heck*. *See Armstrong*, 517 U.S. at 465.) Nor does *Heck* support Petitioners' alternative argument (Pet. Br. at 36) that the absence of probable cause is an element of the constitutional tort claim authorized by *Bivens*. *See infra* Part III.

3. Finally, Petitioners put forth a series of policy arguments relating to the relative competency of the judicial and executive branches and the need for a rule that will avoid undermining prosecutorial effectiveness and chilling law enforcement. Pet. Br. at 19-21, 30-34. Even if such policy considerations could somehow be relevant to determining the substantive scope of the First Amendment right, the short answer to Petitioners' objections is that this Court has never found these policy considerations sufficient to justify a special rule for Equal Protection violations in the prosecution

context. *See supra* pp. 25-27. Similarly, as described above, *see supra* p. 22, the Court in *Crawford-El* found these policy concerns insufficient to justify the creation of special screening mechanisms that "place[] a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved." *Crawford-El*, 523 U.S. at 593; *see also Johnson v. California*, 125 S. Ct. 1141, 1150 (2005) ("[m]echanical deference to [prison officials] would reduce [constitutional protections] to a nullity in precisely the context where [they are] most necessary" (internal quotation marks omitted)). In light of the well-recognized problems of frivolous prisoner litigation and the fact that this Court has continually recognized that prison officials are entitled to the same sort of "wide-ranging deference," *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977), and "broad discretion," *Shaw v. Murphy*, 532 U.S. 223, 232 (2001), that Petitioners claim here, no sensible balancing of factors could lead to a different conclusion in this case.

Even if the Court wished to consider Petitioners' policy arguments *de novo*, Petitioners have failed to make the case that a "unique rule" is necessary here. The relative competence of prosecutors and courts in determining whether a prosecution is justified (Pet. Br. at 19-20) simply has no bearing where *law enforcement officers* acting with retaliatory animus abused their powers when they investigated an individual and procured his indictment and prosecution. While it is true that the courts may need to examine some aspects of the *prosecutor's* decisionmaking as part of their inquiry into causation (Pet. Br. at 32), the purpose of doing so will not be to second-guess the prosecutor, but to determine whether an individual subjected to a retaliatory prosecution was actually injured thereby. The improperly motivated procurement of a prosecution is therefore a far cry from cases cited by Petitioners rejecting claims that certain tactics and discretionary decisions by prosecutors gave rise to violations of due process. *See, e.g.*,

United States v. Goodwin, 457 U.S. 368 380-81 (1982); *United States v. Lovasco*, 431 U.S. 783, 789-90 (1977).

As for the alleged need to avoid unnecessary impairment of a core executive function (Pet. Br. at 20), Petitioners greatly overstate the cause for concern. As the court below recognized, the right to be free from retaliatory prosecutions, including ones backed by probable cause, will permit recovery only in "rare cases." Pet. App. 19a-20a. For one thing, the doctrine of absolute prosecutorial immunity ensures that prosecutors will almost always be entitled to immunity from suits for retaliatory prosecution in violation of the First Amendment. *See Imbler v. Pachtman*, 424 U.S. 409, 424 (1976). Indeed, the Assistant United States Attorney who prosecuted Moore successfully asserted a defense of absolute immunity in an earlier stage of this case. Pet. App. 81a-82a. For this reason, claims for retaliation in the prosecution context will be viable only where, as here, law enforcement officers had a substantial role in procuring the indictment or prosecution. Even then, such officers will be denied qualified immunity only where, as here, retaliatory animus is proven and it is clearly established that the speech in question is protected by the First Amendment.

Moreover, unlike the heightened pleading and proof standards rejected by the Court in *Crawford-El*, Petitioners' proposed rule is particularly ill-suited to screen frivolous claims from meritorious ones, given that the rule has no relation to the *sine qua non* of the constitutional violation—the officer's retaliatory motive. Petitioners' proposed rule would not even appreciably lessen the scope of review, for courts would still need to examine the often complex record compiled by investigators to determine whether probable cause existed. *See, e.g., infra* Part IV. Rather than require such a blunt instrument, the Court should recognize, as the court below did, that district courts can and should employ various procedural mechanisms, including those identified in *Crawford-El*, to screen out baseless motive claims and avoid

unnecessary and burdensome discovery *without* precluding recovery in cases where officers pursue retaliatory charges that would not otherwise have been brought but for their unconstitutional animus. Pet. App. 19a. These mechanisms include requiring plaintiffs to set forth more specific allegations and requiring, as occurred in this case, *see supra* p. 10, narrowly focused discovery, before any other discovery occurs, to resolve questions of retaliatory intent or to determine whether the plaintiff actually suffered injury or engaged in constitutionally protected behavior. *See Crawford-El*, 523 U.S. at 597-600. And, of course, "summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial." *Id.* at 600. In sum, "broad discretion in the management of the fact-finding process may be more useful and equitable to all the parties than the categorical rule" advocated by Petitioners here. *Id.* at 601; *see also Umbehr*, 518 U.S. at 678 ("[t]he dangers of burdensome litigation" can be minimized through "attentive application of the *Mt. Healthy* requirement of proof of causation," rather than "a *per se* denial of liability").

It is unsurprising, therefore, that trials of claims relating to retaliatory procurement of indictments and prosecutions are exceedingly rare. So far as Respondent has been able to discern, in the D.C., Sixth and Tenth Circuits—where it has long been established that the existence of probable cause does not foreclose a claim of retaliatory prosecution—there is *not a single case* of state or federal officials being subject to liability. Moreover, there is no indication that this Court's long-standing recognition that the Equal Protection Clause prohibits race-based decisions to bring prosecutions backed by probable cause has appreciably interfered with the prosecutorial function. *Cf. Payton v. New York*, 445 U.S. 573, 602 (1980) ("[i]n the absence of any evidence that effective law enforcement has suffered . . . such arguments of policy must give way to a constitutional command that we consider to be unequivocal").

Finally, Petitioners ignore an important flip-side to the policies of "effective law enforcement," namely, the need to provide protection for core constitutional guarantees. *See, e.g., Butz v. Economu*, 438 U.S. 478, 506-07 (1978). As explained above, *see supra* pp. 28-29, the need for vigilance is heightened, not lowered, in the context of criminal investigations, especially where law enforcement agents, rather than professional prosecutors, are the ones "picking the man and then searching the law books, or putting investigators to work, to pin some offense on him." Jackson, *supra*; *cf. Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) ("Only someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation."). Indeed, there is no better example of Justice Jackson's paradigm of abuse than the instant case, in which Petitioners "pick[ed]" Moore because of his speech and "went to work[] to pin some offense on him." *See supra* pp. 4-9. Whether or not they found probable cause, the Constitution plainly prohibited Petitioners' conduct.[11]

III. THE ABSENCE OF PROBABLE CAUSE IS NOT AN ELEMENT OF MOORE'S *BIVENS* CLAIM

1. As an alternative rationale for reversal of the decision below, Petitioners argue in passing that the absence of probable cause is an element of Moore's *Bivens* claim for damages, and that Moore's evidence on that matter is insufficient to survive a motion for summary judgment. Pet. Br. at 17, 36-37. As Petitioners concede (*id.* at 37 n.12), this

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[11] The need for an effective *external* check against rogue officers is amply illustrated by the failure of internal checks in this case: the Postal Service not only failed to condemn Petitioners' conduct, but actually rewarded it with awards, plaques, cash bonuses, and instructor positions.

alternative assertion is not part of their qualified-immunity defense, but rather is a separate and distinct question about the availability of a remedy for the constitutional violation at issue. *See supra* pp. 31-32 (explaining distinction between rights and remedies); *Illinois v. Gates*, 462 U.S at 223; *Mt. Healthy*, 429 U.S. at 279, 281. As such, the Court may not address that argument here. It was not raised by Petitioners below,[12] and it is outside the scope of the Petition for Certiorari.[13] Most importantly, the Court lacks jurisdiction to consider it.

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[12] Petitioners' argument in both courts below was only that Petitioners are entitled to qualified immunity from suit. *See supra* pp. 10-11; Pet. App. 6a-7a. Accordingly, the separate claim that probable cause is an element of Moore's *Bivens* cause of action is not properly before this Court. *See Clingman v. Beaver*, 125 S. Ct. 2029, 2041 (2005) ("[w]e ordinarily do not consider claims neither raised nor decided below"); *Gates*, 462 U.S. at 223 (refusing to decide whether particular remedy for constitutional violation is appropriate where question raised was whether constitutional rights were violated); *Mt. Healthy*, 429 U.S. at 279-81 (refusing to consider whether § 1983 remedy could be sought against defendant where issue had not been preserved for appeal). In contending otherwise, Petitioners point to *Yee v. City of Escondido*, 503 U.S. 519 (1992), but *Yee* stands only for the proposition that a party is permitted to make new arguments in support of a preserved claim, not that he may assert an entirely separate and distinct defense to liability.

[13] The Petition for Certiorari made clear that the "ultimate question" for review in this case is "whether the officer is entitled to qualified immunity." Pet. at 24; *see also id.* (describing matter at issue as "question of qualified immunity"). Accordingly, whether the absence of probable cause is an element of a *Bivens* claim is outside the scope of the Petition, and the Court should not reach it. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993); *Yee*, 503 U.S. at 535. This is so even though the literal language of the Question Presented sweeps more broadly than the issue described in the Petition, for parties are not permitted to use artful drafting of the Question to expand the scope of the issues accepted for review. *See Irvine v. California*, 347 U.S. 128, 129 (1954) (plurality op.) ("We disapprove the practice of smuggling additional questions into a case

Specifically, this case comes before the Court as an interlocutory appeal from the district court's denial of Petitioners' motion for summary judgment on their qualified-immunity defense. Appellate jurisdiction over such an interlocutory order is appropriate only because the denial of qualified immunity falls within that small class of "collateral orders" qualifying for immediate appeal. *See Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). But Petitioners' alternative argument—even if it had been presented to and ruled upon by the district court—does not independently qualify for review under the "collateral order" doctrine, *see id.*, as Petitioners appear to concede, *see* Pet. Br. at 37 n.12.

In *Swint v. Chambers County Commission*, this Court examined the authority of federal appellate courts, with interlocutory jurisdiction over a question of qualified immunity, to review, conjunctively, related rulings that are not themselves immediately appealable. 514 U.S. 35, 45-51 (1995). Overturning a lower court's exercise of such "pendent appellate" jurisdiction, the Court expressed doubts that pendent appellate jurisdiction would ever be appropriate (absent authorization by statute or rule), and ultimately concluded that pendent appellate jurisdiction could only be exercised—if at all—where either the pendent question is "inextricably intertwined with [the] decision to deny . . . qualified immunity" or "review of the [pendent issue] [i]s necessary to ensure meaningful review of the [issue over which the court has independent appellate jurisdiction]." *Id.*

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after we grant certiorari. The issues here are fixed by the petition . . . ."). Notably, Moore's Brief in Opposition to the Petition rephrased the question more precisely to reflect the legal issue on which the Petition and the decisions below were based: "Whether the court below properly applied this Court's [precedents] when it held that . . . the defendant officers are not entitled to qualified immunity." Resp. Br. in Opp. at i.

at 51.[14] Plainly, the question whether the absence of probable cause is an element of a *Bivens* claim is not inextricably intertwined with, or necessary to a review of, the independent questions whether Petitioners violated the First Amendment and whether Petitioners are entitled to qualified immunity. *See Gates*, 462 U.S. at 223; *Mt. Healthy*, 429 U.S. at 279-81; *supra* pp. 31-32, 36-37. Accordingly, the Court may not decide that question here.[15]

2. If this Court were to decide that this issue is reviewable, then it should hold that the absence of probable cause is not an element of a *Bivens* claim for damages. As explained above, the scope of constitutional rights cannot be constricted by the common law of torts. *See supra* pp. 30-31. At the same time, this Court has relied upon the common law in filling in the details of the federal causes of action to enforce those rights, turning to the common law for guidance on, for example, principles of damages, causation and immunities from suit. *See, e.g.*, *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986); *Carey v. Piphus*, 435 U.S. 247, 257-59 (1978). In doing so, however, the Court has remained cognizant of the fact that "[t]he federal remedy is supplementary to the state remedy," *Monroe v. Pape*, 365

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[14] *See also Johnson v. Jones*, 515 U.S. 304, 318 (1995) (expressing doubts about the propriety of pendent appellate jurisdiction); *Harlow v. Fitzgerald*, 457 U.S. 800, 820 n.36 (1982) (declining to address question about availability of *Bivens* action where Court "took jurisdiction of the case only to resolve the immunity question under the collateral order doctrine"); *Abney v. United States*, 431 U.S. 651, 663 (1977); *United States v. Stanley*, 483 U.S. 669, 676-77 (1987).

[15] Petitioners acknowledge, but attempt to downplay, the jurisdictional problems created by their alternative argument. Pet. Br. at 37 n.12. But in doing so, Petitioners concede that, to reach their (unpreserved) alternative merits argument, the Court would first need to address a disputed jurisdictional question that itself was neither raised nor decided below and is outside the Question Presented.

U.S. 167, 183 (1961), and "broader than the pre-existing common law of torts," *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). Accordingly, the Court has "never suggested that the precise contours" of the constitutional tort action "can and should be slavishly derived from the often arcane rules of the common law." *Anderson*, 483 U.S. at 645. Rather, where "the interests protected by a particular branch of the common law of torts . . . parallel closely the interests protected by a particular constitutional right," it "may be appropriate to apply . . . tort rules" to constitutional claims. *Carey*, 435 U.S. at 258. But "[i]n other cases, the interests protected by a particular constitutional right may *not* also be protected by an analogous branch of the common law torts." *Id.* (emphasis added). Where the respective interests thus diverge, the Court has not hesitated to define the scope of a constitutional tort action "along principles not at all embodied in the common law." *Anderson*, 483 U.S. at 645. Indeed, a contrary rule would drain the constitutional tort remedies authorized by *Bivens* and § 1983 of any independent significance by relegating individuals to the same causes of action they have at common law.

Here, the interests at the heart of the First Amendment and those protected by the common-law tort of malicious prosecution are fundamentally different. "[T]he purpose behind the Bill of Rights, and of the First Amendment in particular [is] to protect unpopular individuals from retaliation" for the exercise of protected rights. *McIntyre*, 514 U.S. at 357. Thus, the government may not take adverse action against a person "*because of* [his] speech on matters of public concern," *Umbehr*, 518 U.S. at 674—even if the same action could have been taken against him "in the absence of the protected conduct," *Mt. Healthy*, 429 U.S. at 283-84; *see also supra* Part I. In particular, a person may not be subject to "prosecution"—even if the prosecution would otherwise have been justified—"*because of*" his protected speech. *Wayte*, 470 U.S. at 610; *see also supra* Part II. The common-law tort of malicious prosecution, in contrast,

protects an individual's "interest in freedom from *unjustifiable* and unreasonable litigation." 1 Fowler V. Harper *et al.*, *The Law of Torts* § 4.2, at 4:3 (3d ed. 1996) (emphasis added). "The action for damages lies only because the defendant has set in motion the judicial process against the plaintiff in circumstances that are . . . *unjustifiable* and that, therefore, unduly subject the plaintiff to the inconvenience, expense, and in some respects, disgrace of legal proceedings." *Id.* § 4.2, at 4:4; *see also, e.g.*, *Jackson v. Dist. of Columbia*, 710 F. Supp. 13, 14 n.1 (D.D.C. 1989).

Requiring a showing of lack of probable cause thus serves the interests behind the malicious prosecution tort. Because that tort aims to protect plaintiffs from the cost, expense, and burden of unjustifiable litigation, a plaintiff has suffered no wrong if the prosecution was objectively justified, as shown by the presence of probable cause. But a lack of probable cause, standing alone, does not safeguard the interests at the heart of the First Amendment—namely, the right to be free from adverse action taken in retaliation for protected speech. That right is no less violated, and no less cognizable, where the prosecution theoretically could have—but in fact would not have—been brought in the absence of the individual's exercise of his constitutional rights.

The fact that "[a]lmost every [constitutional tort] claim can be favorably analogized to more than one of the ancient common-law forms of action," and, therefore, that "any analogies to those causes of action are bound to be imperfect," *Wilson v. Garcia*, 471 U.S. 261, 272-73 (1985), provides yet another reason to eschew slavish incorporation of common-law tort elements into a constitutional tort claim. In this case, for example, one could also analogize Moore's *Bivens* claim to the tort of abuse of process, which makes a person liable for "us[ing] a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed," *Restatement (Second) of Torts*

§ 682 (1977), and for which "it is immaterial that the process was . . . obtained in the course of proceedings that were brought with probable cause," *id.* § 682 cmt. a. Indeed, given the gravamen of Moore's *Bivens* action—that Petitioners misused their investigatory authority and the grand jury process for the purpose of retaliating against Moore and depriving Moore and REI of the opportunity to compete for the USPS scanner contract, *see supra* pp. 4-9—the abuse of process tort may be a more apt analogy than the tort of malicious prosecution. *See Heck*, 512 U.S. at 495 n.2 (Souter, J., concurring in the judgment) (noting that where one sues to vindicate the right not to be "selected for prosecution" for an unconstitutional reason, "the tort of abuse of process might provide a better analogy"). Instead of attempting to choose between competing analogies, the Court should simply enforce the constitutional right at issue.

Heck v. Humphrey is not to the contrary. *Heck* involved a prisoner's attempt to challenge his ongoing detention by bringing a § 1983 claim for damages stemming from the allegedly unlawful acts that led to his arrest and conviction. 512 U.S. at 478-79. In holding that the prisoner's claim was not cognizable, the Court did little more than reaffirm a long-standing and sensible procedural bar to suits attempting to circumvent the stricter procedural requirements of habeas corpus. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973). The Court did look to the "favorable termination" element of the malicious prosecution tort as "illustrative of the common-law principle barring tort plaintiffs from mounting collateral attacks on their outstanding criminal convictions," *Heck*, 512 U.S. at 484 n.4, but none of the considerations of finality and consistency animating that principle, *id.* at 484-85, is even remotely applicable here. *See also id.* at 500 (Souter, J., concurring in judgment) (noting that Court's ruling "does not transpose onto § 1983 elements of the malicious-prosecution tort that are incompatible with the policies of § 1983 and the habeas statute"). Moreover, *Heck*'s application of a *general* principle of tort law (*i.e.*, "the hoary principle that civil tort

actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," *id.* at 486) to the constitutional tort cause of action is similar to the Court's incorporation into that cause of action of other *general* tort-law requirements, such as actual injury, *see Carey*, 435 U.S. at 264, and causation, *see Malley*, 475 U.S. at 344 n.7. In contrast, nothing in *Heck* requires a *Bivens* or § 1983 plaintiff to establish each substantive element of the common-law tort most analogous to the specific context in which the deprivation of constitutional rights occurred. *See Castellano v. Fragozo*, 352 F.3d 939, 953-54 (5th Cir. 2003) (en banc) ("[C]laims of lost constitutional rights [relating to improper initiation of criminal charges] are for violation of rights locatable in constitutional text . . . . [T]hey are not claims for malicious prosecution and labeling them as such only invites confusion."), *cert. denied*, 125 S. Ct. 31 (2004).[16]

IV. THERE WAS NO PROBABLE CAUSE TO PROSECUTE MOORE

As Petitioners concede (Pet. Br. at 37), the court of appeals' conclusion that Petitioners' retaliatory conduct violated the First Amendment regardless of whether there was probable cause obviated the need for that court to consider whether, contrary to the conclusion of the district court (*see supra* p. 11 & note 3), there was probable cause as a matter of law. *See* Pet. App. 12a. Therefore, if the Court agrees with Petitioners that their conduct would not have violated the First Amendment if there was probable cause, then the Court should, in accordance with its ordinary practice, remand the case and permit the court below to

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[16] For the same reasons that they fail to support Petitioners' argument about the scope of the First Amendment right, Petitioners' policy arguments do not justify requiring a *Bivens* or § 1983 plaintiff to prove the absence of probable cause. *See supra* pp. 28-30, 32-36.

address that issue in the first instance. *See Devenpeck v. Alford*, 543 U.S. 146, 125 S. Ct. 588, 595 (2004); *Ornelas v. United States*, 517 U.S. 690, 700 (1996); *Anderson*, 483 U.S. at 646 & n.6. Should the Court choose to reach the issue, however, a fair review of the facts shows that the exculpatory evidence was so powerful and the evidence of guilt so flimsy that Petitioners did not believe, and could not reasonably have believed, that there was probable cause to prosecute Moore. At a minimum, the facts are sufficiently in dispute to require a jury to decide this issue. *See Davis v. Giles*, 769 F.2d 813, 815 (D.C. Cir. 1985).

The primary charge against Moore, and the only count of the indictment that Petitioners defend (Pet. Br. at 37), was conspiracy to defraud the United States in violation of 18 U.S.C. § 371. J.A. 482, 517-18. The "essence" of criminal conspiracy is "an agreement to commit an unlawful act." *Iannelli v. United States*, 420 U.S. 770, 777 (1975). To prove such an agreement, the government must show not only that the defendant knew the other conspirators planned to commit a crime, "but also that with knowledge of their plan and objectives, he agreed to join them." *United States v. Wilson*, 160 F.3d 732, 737 (D.C. Cir. 1998). A conspiracy thus requires a "'meeting of minds' concerning the object of the conspiracy" or the "essential nature" of the criminal activity involved in the conspiracy. *United States v. Hitt*, 249 F.3d 1010, 1015 (D.C. Cir. 2001). Mere "general knowledge of a planned crime" is "insufficient." *Wilson*, 160 F.3d at 737-38.

In the context of an indictment, probable cause exists only if the facts are "sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975) (internal quotation marks omitted, alteration in *Gerstein*)). In determining what a prudent man would believe, all evidence in the possession of the officer must be examined, including exculpatory evidence. *See, e.g.*,

Gardenhire v. Schubert, 205 F.3d 303, 318 (6th Cir. 2000); *DeLoach v. Bevers*, 922 F.2d 618, 620-21 (10th Cir. 1990). Under these standards, there was no probable cause to prosecute Moore for conspiracy to defraud the United States, and Petitioners knew it. In setting forth the purported evidence of probable cause, Petitioners fail to acknowledge the overwhelming evidence that Moore neither knew of the essential nature of the criminal activity involved in the Voss kickback conspiracy, nor agreed to join in it. Primary among the exculpatory evidence is the fact that, despite extraordinary pressure to implicate Moore and with no reason to protect him, the known conspirators unanimously denied that they ever told Moore, or anyone else at REI, about the payments at the core of the conspiracy. *See supra* pp. 5-6, 8. As a result of these statements—the veracity of which Petitioners had no reason to doubt—Petitioners conceded in a contemporaneous writing that, in their view, their evidence showed that REI, "*but not MOORE . . . individually*, w[as] aware of Voss' corrupt actions." J.A. 333 (emphasis added). Senior officials in the U.S. Attorney's Office, too, were highly skeptical of the case against Moore. *See supra* p. 7; J.A. 447, 453, 455.

The allegation that Moore conspired with Spartin to conceal Spartin's association with GAI and REI from the Postal Service (Pet. Br. at 39) was even more spurious. None of the coconspirators ever claimed that they told Moore that Spartin's role with GAI and REI was a secret or should not be disclosed. To the contrary, the evidence collected by the Postal Inspectors demonstrated that Spartin openly held himself out to various USPS officials as president of GAI, and that Moore knew this was so. *See Recognition Equip. Inc.*, 725 F. Supp. at 596-98. There simply was no evidence that Moore knew of this purported aspect of the conspiracy, let alone agreed to further its aims.

Moreover, Petitioners' improper and unethical behavior in preparing their case for the grand jury, *see supra* p. 8, can

only be explained by Petitioners' recognition that "their case needed bolstering." Pet. App. 27a. This bizarre behavior included: preparing, for each grand jury witness, carefully crafted statements that purposely omitted exculpatory evidence in violation of DOJ Guidelines; improperly controlling (without supervision by the Assistant U.S. Attorney) what evidence was presented to the grand jury; refusing to let at least one witness, Frank Bray, and his lawyer, now-district judge Ellen Huvelle, alter the witness statement that Petitioners had drafted for him; attempting to coerce another witness, William Spartin, into incriminating Moore, even taking the unprecedented step of participating in a preplanned ploy where the lead prosecutor and up to ten postal inspectors surrounded Spartin, accused him of lying and literally tore up a copy of his immunity agreement; improperly showing Spartin the grand jury statements of others in order to elicit a bogus "opinion" that was contrary to his personal knowledge; and engaging in unusual and aggressive lobbying of the U.S. Attorney's office to authorize Moore's prosecution. *See supra* pp. 7-8.

In the face of the profound evidence exonerating Moore, Petitioners cobble together various pieces of disputed and ambiguous evidence, and, relying on ostensibly reasonable inferences, argue that there was reason to believe Moore was guilty of a crime. Most of this evidence purports to show Moore's alleged knowledge of the conspiracy. *See* Pet. Br. at 4 ("had been aware"); *id.* at 18 ("suggest awareness"), *id.* at 40-41 ("evidence that respondent had knowledge"). As noted above, however, mere knowledge of a conspiracy is insufficient to create criminal liability. *See supra* p. 44. In all events, Petitioners' evidence is too weak to establish probable cause to believe that Moore even knew of the conspiracy—let alone committed a crime by agreeing to join it—particularly when the record is viewed most favorably to Moore, as it must be on summary judgment. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

1. Petitioners first point to the fact of Moore's indictment as "evidence" of probable cause. Pet. Br. at 39. An indictment is deprived of whatever probative force it may have had, however, where, as here, *see supra* p. 8, it was obtained by withholding evidence from, and misrepresenting evidence to, the grand jury. *See DeLoach*, 922 F.2d at 620-21; *White v. Frank*, 855 F.2d 956, 961-62 (2d Cir. 1988). Similarly, no inference of probable cause can be taken from the involvement of the U.S. Attorney's Office: the ordinary checks that might have prevented rogue law enforcement officers from procuring a baseless prosecution failed in this case because Petitioners were aided by an Assistant U.S. Attorney who admitted to placing personal career goals ahead of his consideration of Moore's guilt or innocence. *See supra* p. 7; J.A. 442, 445-46.

2. Petitioners suggest that Moore's knowledge of the conspiracy can be inferred from the retention of GAI. *See* Pet. Br. at 39. There was, however, nothing suspicious about Voss's recommendation of GAI, his interest in whether REI acted on that recommendation or the manner by which REI retained GAI. *See Recognition Equip.*, 725 F. Supp. at 590; *supra* p. 5. Similarly, Moore's comment that Reedy should not drop the ball on the GAI recommendation (Pet. Br. at 39) does not suggest anything illegal; it simply admonishes Reedy that he should give Voss, who was on the Postal Service Board of Governors, "the courtesy of following up as [Reedy] said [he] would." J.A. 156-57.

3. Petitioners contend that they had probable cause because Gnau told Reedy to refer to Voss as "our friend," and because, when Reedy asked Gnau about his relationship with Voss, Gnau answered, "[i]t's better you not know." Pet. Br. at 39-40. Even if it is assumed that this exchange may have raised some suspicions in *Reedy's* mind, Petitioners offer no evidence suggesting that Reedy passed any such suspicions on to Moore, other than a conclusory statement that such an inference would be reasonable. Pet.

Br. at 41. In fact, such an inference would have been unreasonable in light of the complete absence of any evidence that Reedy told Moore about any suspicions. *See* J.A. 164-65. Moreover, even if Reedy had harbored suspicions and communicated them to Moore, a conspiracy requires more than just suspicion that some criminal activity is afoot. *See, e.g.*, *Wilson*, 160 F.3d at 738. It requires evidence that the defendant knew of the conspiracy's operation and agreed to join in it. *Id.* at 737-38.

4. Petitioners point to Reedy's initial concealment of the fact that REI hired GAI at Voss's recommendation. *See* Pet. Br. at 40. Again, this evidence at best might raise inferences about Reedy, but there was nothing to tie it to Moore. Moreover, as Judge Revercomb observed, not much can be read into Reedy's misstatement because Reedy was upset at the time about improper conduct by Petitioner Edwards earlier that day and because the next time Reedy met with the inspectors "he apologized for lying and told the Inspectors that Voss had referred REI." *Recognition Equip.*, 725 F. Supp. at 595; *accord* J.A. 154-56, 215-17. Furthermore, a false exculpatory statement shows only knowledge that an individual was "caught up in a situation involving criminal activity," not knowledge of the essential operation of the conspiracy or agreement to further it. *United States v. Nusraty*, 867 F.2d 759, 765-67 (2d Cir. 1989); *see also United States v. Teffera*, 985 F.2d 1082, 1087 (D.C. Cir. 1993). Thus, Reedy's misstatements cannot establish probable cause to indict Moore. For similar reasons, Frank Bray's alleged alteration of travel records (Pet. Br. at 40) offers no support because of the absence of evidence suggesting that Moore was aware of the alterations.

5. There is nothing remotely suspicious about Moore's possession of information from a closed session of the USPS Board of Governors. Pet. Br. at 40. As Petitioners learned at the time, Moore received the information through legitimate congressional channels. J.A. 159-60. Similarly, the fact that

Moore's "Postal" notebook was missing pages (Pet. Br. at 40) has a completely innocent explanation: Moore occasionally removed pages from his notebooks for his secretary to type. J.A. 172-73. Petitioners may not have been aware of this explanation because they failed to ask Moore about the missing pages, but a law enforcement officer is not warranted in relying upon circumstances deemed by him to be suspicious when he fails to "avail himself of readily available information that would have clarified matters" *Sevigny v. Dicksey*, 846 F.2d 953, 957 (4th Cir. 1988). Likewise, the instructions given to REI employees interviewed by the inspectors (Pet. Br. at 40) are innocuous. These instructions—such as informing the employees that they can answer "I really can't remember" and should not try to "show . . . how smart you are"—are standard deposition defense advice, *see, e.g.*, David M. Maloney & Peter J. Hoffman, *The Effective Deposition* 90-94 (1993), and Petitioners knew they were taken from a commercial videotape on depositions that REI's attorneys used to counsel REI's employees. J.A. 173-74. Moreover, Petitioners knew that Moore had admonished REI employees to be helpful, accurate and honest. *Id.*

6. Finally, Petitioners point out that Moore told them that he did not believe Spartin was conducting a search for candidates to replace Carlin when, in fact, Moore recommended candidates and made an introductory call to one of them, Pet. Br. at 40, but they do not explain how any inference that Moore knew about the conspiracy and agreed to join it can be drawn from this statement. Petitioners point to Spartin's attempt to implicate Moore in his own cover-up as evidence of Moore's involvement in the conspiracy, *id.*, but as Spartin told Petitioners, Moore flatly refused to go along with Spartin's efforts to have him participate in the cover up, *see* J.A. 169-71. Moreover, Gnau confirmed that Moore was concerned that Spartin was trying to involve him in some kind of a cover up, not that Moore himself was involved in hiding any information. *Id.* Thus, Petitioners

were well aware that there was "no evidence that Moore tried to hide the fact that he recommended Casey to Spartin for the position of PMG." *Recognition Equip.*, 725 F. Supp. at 600.

In sum, the totality of Petitioners' evidence did not even "support a reasonable inference that [Moore] knew" of, let alone agreed to join, any illegal conspiracy. *Id.* at 589. Petitioners simply cannot escape the fact that they had in their possession powerful exculpatory evidence showing that Moore never agreed to join the conspiracy and that he lacked knowledge about its essential operation. Petitioners therefore lacked probable cause—indeed, they admitted it at the time, *see* J.A. 333 (conceding that REI, "but not MOORE . . . individually," may have been aware of the conspiracy)—and no reasonable officer could have thought otherwise. At a minimum, sufficient facts are in dispute to require the matter to be presented to a jury. *See Giles*, 769 F.2d at 815.

CONCLUSION

For the reasons set forth above, the decision of the court below should be affirmed.

Respectfully submitted,

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No. 04-1495

In the Supreme Court of the United States

MICHAEL HARTMAN, ET AL., PETITIONERS

v.

WILLIAM G. MOORE, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

A showing that the prosecution lacked probable cause is a necessary element of a claim of First Amendment retaliatory prosecution. That rule provides an objective gateway for screening claims of retaliatory prosecution. It accords with the heightened deference traditionally afforded by the courts to the exercise of the prosecutorial function. It is deeply rooted in the common law tort of malicious prosecution, of which a claim of First Amendment retaliatory prosecution is simply one example. And, as with the tort of malicious prosecution generally, the requirement that the plaintiff establish the absence of probable cause as a necessary element of a First Amendment claim appropriately balances the public interest in encouraging the reporting of evidence of violations of the law to the prosecutor against the individual interest in not being subjected to baseless prosecution in retaliation for the exercise of First Amendment rights.

Under our constitutional system, the prosecutor and the grand jury exercise independent judgment in determining whether an individual will be prosecuted, and they therefore afford independent protection against unwarranted or malicious prosecutions. See *Gerstein* v. *Pugh*, 420 U.S. 103, 121 n.22 (1975); *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). The decision to prosecute is inherently discretionary and sufficiently likely to provoke potential litigation that the prosecutor (like the grand jury) enjoys absolute immunity from suit, in order to serve the broader public interest in the vigorous and fearless performance of his duties, including the exercise of his independent judgment in deciding whether to prosecute. See *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). But the litigation that respondent envisions would routinely open up the prosecutorial decisionmaking process—a source of information relevant to the First Amendment plaintiff's burden to show that the retaliatory motive was the key causal

factor that led to the prosecution. The requirement to show an absence of probable cause thus furnishes a critical objective check against routine, chilling, and unwarranted judicial scrutiny of prosecutorial decisionmaking based on allegations concerning the motives of persons several steps removed from the ultimate decision to prosecute.

Respondent nonetheless contends (Br. 17-43) that a claim of retaliatory prosecution should not require a showing of an absence of probable cause for the charges and, indeed, should require *no* objective showing at all. As the brief of amici National League of Cities *et al.* underscores, however, the adoption of respondent's position would establish an inherently subjective and unworkable test that would chill legitimate law enforcement activities across the Nation. The various objections respondent raises to the probable cause element, moreover, are without merit. So, too, is respondent's contention (Br. 43-50) that there was no probable cause for the charges against him. Finally, respondent's assertions about the evidence of petitioners' motives (see Br. 4-8) are inaccurate. See pp. 18-20, *infra*.

I. TO ESTABLISH A CLAIM OF RETALIATORY PROSECUTION, A *BIVENS* PLAINTIFF MUST DEMONSTRATE THAT THERE WAS NO PROBABLE CAUSE FOR THE CHARGES

A. A First Amendment Claim Of Retaliatory Prosecution Does Not Lie If There Was Probable Cause For The Charges

1. Respondent contends that petitioners' submission —that absence of probable cause is an element of a First Amendment retaliatory prosecution claim—is "directly foreclosed" by the precedents of this Court stating that the decision to prosecute is "subject to constitutional constraints." Br. 23 (quoting *United States* v. *Batchelder*, 442 U.S. 114, 125 (1979)); accord *id.* at 18-19. That is a *non sequitur*. It is undisputed that a prosecution can violate the First

Amendment. At issue is whether the absence of probable cause is a necessary element of such a First Amendment claim. As five courts of appeals have held, it is. Adoption of that rule by this Court obviously would not mean that there are no First Amendment limitations on the decision to prosecute. It would merely subject the decision to prosecute to a bright-line "constitutional constraint."

Respondent is also mistaken in his contention (Br. 20-22) that adoption of petitioners' view is foreclosed by *Crawford-El* v. *Britton*, 523 U.S. 574 (1998). That case presented the question whether there should be "special procedural rules" for any "constitutional claim that requires proof of improper motive." *Id.* at 577. The Court answered that question no. This case concerns the distinct question of what *substantive* rules govern a constitutional challenge to *a decision to prosecute*. Because such a decision is "particularly ill-suited to judicial review," *Wayte* v. *United States*, 470 U.S. 598, 607 (1985), and because judicial review would "impair the performance of a core executive constitutional function," *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996), this Court's cases "uniformly have recognized that courts normally must defer to prosecutorial decisions as to whom to prosecute," *Town of Newton* v. *Rumery*, 480 U.S. 386, 396 (1987) (opinion of Powell, J.). The plaintiff in *Crawford-El* did not challenge a decision to prosecute, and the case did not purport to alter the well-established principle—reaffirmed only two years earlier in *Armstrong*—that special considerations apply to constitutional challenges to prosecutorial decisionmaking.

Armstrong allows a challenge to a prosecution decision that was allegedly based on race. Government actions based on race are especially odious under the Constitution and are generally subject to exacting review, even in contexts where significant deference is given to decisions alleged to violate other constitutional provisions, including the First Amendment. See, *e.g.*, *Johnson* v. *California*, 125 S. Ct. 1141 (2005) (holding deferential approach of *Turner* v. *Safley*, 482 U.S.

78 (1987), inapplicable to race-based equal protection claims). Even so, the Court has held that the standard for making out such a claim in the prosecution context is "rigorous" and "demanding," and requires an objective showing that similarly situated persons of a different race were treated differently. See pp. 6-7, *infra*. That requirement does not mean that prosecutorial decisionmaking is not subject to constitutional constraint, but it does prevent routine intrusion into prosecutorial decisionmaking. The showing required to make out a First Amendment retaliatory prosecution claim must likewise be rigorous and demanding, and must likewise avoid scrutiny of prosecutorial decisonmaking unless there is an objective showing—the absence of probable cause.

Respondent contends that petitioners' position is "conceptually incoherent," because "it makes no sense to say that the existence of a constitutional violation depends on the specific nature of the improperly motivated act." Br. 22-23. That contention is refuted by, *inter alia*, *Armstrong*, *Turner* v. *Safley*, and the line of cases that begins with *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), and includes *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), one of the principal authorities on which respondent relies. The cases in the *Pickering* line hold that, when a public employer takes an adverse action against an employee on the basis of his speech, the action violates the First Amendment only if the speech is "on a matter of public concern" and the employee's interest in expressing himself is not "outweighed by any injury the speech could cause to 'the interest of the * * * employer[] in promoting the efficiency of the public services it performs.'" *Waters* v. *Churchill*, 511 U.S. 661, 668 (1994) (opinion of O'Connor, J.) (quoting *Connick* v. *Myers*, 461 U.S. 138, 142 (1983), in turn quoting *Pickering*, 391 U.S. at 568). Out of concern for the special nature of government employment, this Court's decisions in that area make clear that the existence of a First Amendment violation depends on the nature of the speech

and the nature of the justification for the action—*i.e.*, the "specific nature" (Resp. Br. 23) of the challenged action.

The specific nature of a decision whether to file criminal charges is that it reflects the exercise of "one of the core powers of the Executive Branch of the Federal Government," *Armstrong*, 517 U.S. at 467, and is therefore a decision that courts are "properly hesitant to examine," *Wayte*, 470 U.S. at 608. For that reason, it "makes no sense" (Resp. Br. 22) to apply the First Amendment to that decision the same way it is applied to "any [other] official act" (*id.* at 18). Rather, just as First Amendment interests must be weighed against other important considerations under *Pickering* and its progeny, First Amendment interests in this context must be balanced against the fundamental public interests in the investigative and prosecutorial functions and the vigorous enforcement of the law. See also *Reno* v. *American-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 487-492 (1999) (declining to recognize First Amendment selective enforcement claim in immigration context).

2. In our opening brief (at 21-24), we show that the court of appeals' approach is flawed because, *inter alia*, it allows challenges to prosecutions allegedly based on speech to proceed under more relaxed standards than challenges to prosecutions allegedly based on race. Respondent contends, however, that it is actually petitioners' rule that would "destroy the * * * symmetry between the First Amendment and the Equal Protection Clause in the prosecutorial context," because a racially motivated prosecution violates equal protection "even if the prosecution is supported by probable cause." Br. 25 (emphasis omitted). It is true that, under petitioners' approach, a claim of selective prosecution and a claim of retaliatory prosecution have different objective elements (just as they have different subjective elements): the former requires proof that the decision to prosecute was motivated by the defendant's race and that similarly situated members of a different race were not prosecuted, while the

latter requires proof that the decision was motivated by the defendant's speech and that there was no probable cause for the charges. Respondent's approach creates a far more fundamental asymmetry, however, because it does not require proof of *any* objective element for a claim of retaliatory prosecution as opposed to a claim of selective prosecution.

Indeed, respondent's approach creates *two* fundamental anomalies. Just as respondent's rule imposes a *lesser* burden on a retaliatory prosecution claimant than on a selective prosecution claimant (despite the similarity of their claims and the degree of intrusion into the prosecutorial function they entail), it imposes *no greater burden* on a retaliatory prosecution claimant than on a plaintiff alleging speech-based retaliation *outside the prosecutorial context* (despite the special considerations that govern challenges to prosecutorial decisionmaking). Respondent's approach also provides more protection in the First Amendment context despite the reality that, unlike race, which never plays a legitimate role in the decision to prosecute, First Amendment activity may often be highly relevant evidence that informs a decision to prosecute. See Pet. Br. 23-24.

Respondent disputes the need for any special rule for claims of retaliatory prosecution on the asserted ground that this Court's decision in *Armstrong* does not "create[] a special Equal Protection rule" for claims of selective prosecution. Br. 25. That is not correct. In *Armstrong* the Court said that, because "[a] selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive," it has "taken great pains" to explain that the "standard for the elements" of such a claim is "rigorous" and "demanding." 517 U.S. at 463, 464, 468 (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985)). Citing *Armstrong*, the Court in *AADC* reiterated that, "in the criminal-law field, a selective prosecution claim is a *rara avis*." *Id.* at 489. It remains a *rara avis* notwithstanding the obvious incentive of

criminal defendants to bring such claims, because this Court has recognized that "such claims invade a special province of the Executive—its prosecutorial discretion," and the Court accordingly has "emphasized that the standard for proving them is particularly demanding." *Ibid.* (citing *Armstrong*, 517 U.S. at 463-465). If there were no "special Equal Protection rule in the context of criminal prosecutions" (Resp. Br. 25), the language in those decisions would be inexplicable, particularly in view of the absence of comparable language in equal protection cases outside the prosecutorial context. If "[t]he *Armstrong* rule" were the general rule, moreover, a plaintiff in an ordinary case who could show that the challenged government action was taken "on the basis of discriminatory [racial] animus," but was "incapable of showing similarly situated individuals who were treated differently," would be unable to establish an equal protection violation. *Pyke* v. *Cuomo*, 258 F.3d 107, 109 (2d Cir. 2001). As Judge Leval has observed, that is "clearly not the law" in the ordinary case. *Ibid.*[1]

Respondent also contends that, under his approach, a retaliatory prosecution claim and a selective prosecution claim are not fundamentally different. In particular, he asserts that the requirement of proof that a retaliatory prosecution claimant would not have been prosecuted but for his speech "serves the same purpose" that the "similarly situated" re-

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[1] Citing *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), respondent argues that, "under standard Equal Protection analysis applicable in all contexts, a showing of discriminatory effect is generally an 'important starting point' for showing that the adverse action furthered a discriminatory purpose." Br. 27 (quoting 429 U.S. at 266). What he seems to mean is that discriminatory effect is merely "circumstantial * * * evidence of intent." *Arlington Heights*, 429 U.S. at 266; see also *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). While that may be true in an ordinary equal protection case like *Arlington Heights*, *Armstrong* requires proof of discriminatory effect regardless of whether other circumstantial evidence independently establishes discriminatory purpose.

quirement serves in a selective prosecution case. Br. 28. That assertion is flawed on a number of levels. First, because causation is an element of any constitutional claim based on an improper motive, see *Crawford-El*, 523 U.S. at 593, it is an element of *both* selective prosecution claims *and* retaliatory prosecution claims, and thus the independent "similarly situated" element of the former performs an objective screening function with no counterpart in the latter. Second, while the "similarly situated" element is objective, the "but for" element is purely subjective: it asks whether the prosecution was motivated by the plaintiff's speech, and, if so, whether there were additional motivations for the prosecution that, by themselves, would have resulted in the filing of charges. Third, because, under respondent's approach, a retaliatory prosecution plaintiff does not have to establish any objective element, and because an improper motive is "easy to allege and hard to disprove," *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 175 (2004) (quoting *Crawford-El*, 523 U.S. at 585), respondent's standard makes it much easier for a retaliatory prosecution plaintiff to obtain discovery and defeat a motion for summary judgment than it is for a selective prosecution plaintiff, who must clear an objective hurdle. Finally, while it is the claimant in a selective prosecution case who bears the burden of establishing that similarly situated members of a different class were not prosecuted, under respondent's approach it is the government official who bears the burden of establishing that the prosecution would have been brought even if the plaintiff had not expressed the speech at issue. See Pet. App. 13a.

Particularly in light of the core Executive interests at stake in the decision whether to prosecute an individual for a crime and the public interest in encouraging the vigorous enforcement of the criminal laws, this is an area in which the need for a bright-line rule is paramount. Probable cause provides courts and law enforcement officers with a familiar ob-

jective standard for identifying meritorious claims at an early stage of litigation. Respondent's purely subjective motive test provides no objective, much less workable, criterion for identifying meritorious claims and, instead, would only invite additional litigation by disgruntled former defendants and intrusive discovery into the prosecutorial process.[2]

3. As the opening brief explains (at 24-30), the common law tort of malicious prosecution furnishes the proper framework for identifying the elements of a claim of retaliatory prosecution in violation of the First Amendment. That tort—and the strict limits placed on it to protect the public interest in pursuing well-founded prosecutions—predated the First Amendment, and this Court has repeatedly recognized that the absence of probable cause is an element of the tort. See Pet. Br. 26-29. As the Court has explained, "a person actuated by the plainest malice may nevertheless prefer a well-founded accusation." *Wheeler* v. *Nesbitt*, 65 U.S. (24 How.) 544, 550 (1861). The requirement of showing an absence of probable cause serves to protect the public interest in proceeding with such a "well-founded accusation." See also W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 119, at 876 (5th ed. 1984) ("[I]t is the part of a good citizen to bring about the prosecution of those who are reasonably suspected of crime, and the addition of a personal motive should not result in liability for performing a public obligation."); cf. *Devenpeck* v. *Alford*, 125 S. Ct. 588, 594

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[2] The requirement to show the absence of probable cause can be conceptualized either as an objective screen analogous to the similarly situated requirement in retaliatory prosecution claims, or as a recognition that individuals lack a constitutionally protected interest in a prosecutor's decision to exercise discretion not to prosecute despite the existence of probable cause, unless that decision is based on a suspect classification. Either way, the requirement to show the absence of probable cause reflects an appropriate reconciliation of First Amendment interests with the unique nature of the decision whether or not to initiate a prosecution.

(2004) (subjective motivation of police officer irrelevant to lawfulness of arrest supported by probable cause).[3]

Respondent contends that, while it is appropriate to "look to the common law to determine the contemporaneous understanding of particular terms * * * used in the Constitution," it is not appropriate to "search for a common-law tort analogy" to the particular context in which the constitutional right is raised and then "use that analogy to contract the scope of the constitutional right." Br. 31 (emphasis omitted). The suggestion that adherence to the common law would contract the scope of a constitutional right, however, simply assumes the answer to the question presented in this case: whether the First Amendment accords a right to be free from a prosecution that is fully supported by probable cause simply because an investigative officer was motivated by a desire to retaliate against the defendant for his speech. And contrary to respondent's suggestion that petitioners are not relying on the common law "to determine the content" of the First Amendment (*ibid.*), the fact that the Founding-era common law did *not* accord a right to be free from a prosecution supported by probable cause that was motivated by a malicious purpose (see Pet. Br. 28-29) is evidence of the "contemporaneous understanding of [the First Amendment's] guarantees," *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984). Cf. *Branzburg* v. *Hayes*, 408 U.S. 665, 685 (1972) (holding that First Amendment accords no right to withhold identity of confidential source from grand jury, and relying, in part, on fact that, "[a]t common law, courts consistently refused to recognize the existence of any privilege authorizing a

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[3] Respondent's theory presumably would provide a constitutional tort remedy no matter how manifestly guilty the defendant, so long as the "smoking gun" evidence was rooted out by an officer who had a retaliatory motive. The societal interest in ensuring that the prosecutor, who controls the intervening decision to prosecute, has all available probative evidence suggests the need for caution in policing the motives of those who furnish the prosecutor with evidence of a crime.

newsman to refuse to reveal confidential information to a grand jury"). Nor is there anything unusual about relying upon "a common-law tort analogy" (Resp. Br. 31) in this context. See, *e.g.*, *Wilson* v. *Arkansas*, 514 U.S. 927, 933 (1995) (unanimously holding that common law "knock and announce" principle is part of reasonableness inquiry under Fourth Amendment; relying, in part, on fact that "[e]arly American courts" embraced that principle; and citing decisions involving common law tort of trespass) (citing *Walker* v. *Fox*, 32 Ky. (2 Dana) 404 (1834), *Burton* v. *Wilkinson*, 18 Vt. 186 (1846), and *Howe* v. *Butterfield*, 58 Mass. (4 Cush.) 302 (1849)).

4. As the opening brief makes clear (at 30-34), the court of appeals' standard disregards the special considerations that govern constitutional challenges to a decision to prosecute. Respondent contends, however, that "[t]he relative competence of prosecutors and courts in determining whether a prosecution is justified" has no relevance when it is *law enforcement officers* who "procure[] [an] indictment and prosecution" with "retaliatory animus." Br. 33. Respondent acknowledges that, under the court of appeals' approach, courts would still routinely be required to examine "the *prosecutor*'s decisionmaking as part of their inquiry into causation," but argues that "the purpose of doing so will not be to second-guess the prosecutor, but to determine whether an individual subjected to a retaliatory prosecution was actually injured thereby." *Ibid.* But while second-guessing the prosecutor might not be the purpose of the inquiry, it would be the effect. Indeed, an inquiry whose purpose is to divine whether a prosecution would have been brought absent certain input would require both a reconstruction of the prosecutorial decisionmaking that led to a particular indictment and a broader inquiry into prosecutorial standards to determine whether a particular prosecution was typical. Such inquiries would threaten to "chill law enforcement by subjecting the prosecutor's motives and decisionmaking to out-

side inquiry" and "undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 607). Those are the principal reasons for "[j]udicial deference" in this area. *Ibid.*

Respondent also contends that petitioners have "greatly overstate[d]" the extent to which his rule would impair "a core executive function," because, under his approach, a retaliatory prosecution claim "will be viable only where, as here, law enforcement officers had a substantial role in procuring the indictment or prosecution." Br. 34. But it is the rare case in which law enforcement officers *do not* play a substantial role in procuring a prosecution. Prosecutors generally do not discover criminal conduct on their own; cases are brought to them for prosecution (or at least for further investigation) by law enforcement officers, who thereby become potential defendants in a retaliatory prosecution suit. As amici National League of Cities *et al.* explain, the court of appeals' approach would "discourage law enforcement officers from pursuing the prosecution of serious crimes," and thus "undermine[] the strong public interest in having law enforcement officers present cases of criminal conduct to prosecutors." Br. 18.

According to respondent, the rule that petitioners advocate is unnecessary, because district courts can employ "various procedural mechanisms," including requiring more specific allegations, narrowly focused discovery, and summary judgment, to "screen out baseless motive claims and avoid unnecessary and burdensome discovery." Br. 34-35. This Court has never relied on such mechanisms in cases involving a constitutional challenge to the decision to prosecute, however, and it certainly has not done so in selective prosecution cases. A successful claim of selective prosecution is a "*rara avis*," *AADC*, 525 U.S. at 489, not because of procedural mechanisms, but because there is "a rigorous

standard for *the elements*" of the claim, *Armstrong*, 517 U.S. at 468 (emphasis added).

Respondent says that "trials of claims relating to retaliatory procurement of indictments and prosecutions are exceedingly rare," and that he is unaware of any case in the circuits that apply his standard in which a government official has been found liable. Br. 35. But a decision by this Court embracing his standard could change all that, by causing more cases to be brought and leading to verdicts against law enforcement officers following well-founded prosecutions. In any event, it is not only the fact that law enforcement officers will be required to stand trial, or will be found liable, that "threatens to chill law enforcement" and "undermine prosecutorial effectiveness." *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 607). The filing of the lawsuit itself, which, under respondent's standard, cannot be terminated at an early stage on the basis of an objective showing, would have that effect. Indeed, the *mere possibility* that a law enforcement officer who recommends prosecution will be subject to a civil suit despite the existence of probable cause may lead the officer to "shade his decision[] instead of exercising the independence of judgment required by his public trust." *Imbler* v. *Pachtman*, 424 U.S. at 423.

B. There Is No Cause Of Action Under *Bivens* If There Was Probable Cause For The Charges

There is no merit to respondent's arguments (Br. 39-43) against the narrower ground for reversing the court of appeals—*i.e.*, that absence of probable cause is an element of the constitutional tort of retaliatory prosecution (see Pet. Br. 36-37). Even if *Heck* v. *Humphrey*, 512 U.S. 477 (1994), does not require *every* Section 1983 or *Bivens* plaintiff to establish "each substantive element" of the common law tort most analogous to the constitutional violation asserted (Resp. Br. 43), there are no countervailing considerations that would

justify *not* incorporating the elements of the common law tort of malicious prosecution into the constitutional tort of retaliatory prosecution. On the contrary, the principal considerations that bear on the question (other than the firmly grounded rule of the common law itself) are those that counsel great hesitation in reviewing a decision to prosecute, and they strongly confirm the correctness of limiting the availability of a damages action for retaliatory prosecution to cases in which probable cause was absent. The Court relied on considerations of that kind in holding that 42 U.S.C. 1983 incorporates the common law rule of absolute immunity for prosecutors, see, *e.g.*, *Burns* v. *Reed*, 500 U.S. 478, 484-487 (1991); *Imbler*, 424 U.S. at 420-429, and they likewise justify incorporating the elements of the common law tort of malicious prosecution in a damages action for retaliatory prosecution against investigators. Cf. *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983) ("special factors" preclude recognition of *Bivens* cause of action by enlisted military personnel against superior officers). Inasmuch as prosecutors (like the one in this case) are absolutely immune from a damages suit for retaliatory prosecution even though it is they who make the ultimate decision to prosecute, it can hardly be objected that such a result is overly protective of other law enforcement officers, who enjoy only qualified immunity from a retaliatory prosecution suit despite being able to do no more than recommend that a prosecution be brought. Cf. Pet. App. 50a n.2 (earlier appeal) ("It may seem odd that the only official who could not be held liable for * * * retaliatory prosecution is the prosecutor.").

Contrary to respondent's contention (Br. 37-39), the fact that this case is on appeal from the denial of petitioners' motion for summary judgment on the ground of qualified immunity, see *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-530 (1985), does not prevent the Court from deciding the case on the

narrower ground.[4] An appellate court's jurisdiction to consider a claim of qualified immunity gives it the authority to consider the antecedent question whether a *Bivens* cause of action is available at all. See Pet. Br. 37 n.12 (citing cases). As the Eighth Circuit has explained, the question whether a cause of action is available is "purely legal," and it is "'inextricably intertwined' with," "analytically antecedent to," and "in a sense also pendent to" the question whether the defendants violated a clearly established constitutional right. *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1083 (8th Cir. 2005) (internal quotation marks omitted), petition for cert. pending, No. 04-1611 (filed May 31, 2005). Moreover, the issue is potentially "dispositive," and deciding it "serves the interests of judicial economy." *Ibid.* Federal officers should not be burdened with "the cost and time of litigating a lawsuit which, if no *Bivens* remedy exists, is doomed from its inception." *Ibid.*[5]

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[4] Nor does the fact that the ground was not separately relied upon in the lower courts. The theories advanced by petitioners in this Court —that the absence of probable cause is an element of a First Amendment claim and that (even if it is not) it is an element of a *Bivens* cause of action—are "not separate *claims*"; they are, rather, "separate *arguments* in support of a single claim"—namely, that the existence of probable cause defeats a claim of retaliatory prosecution. *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992). Cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 378-379 (1995). The question on which certiorari was granted, moreover, is not whether the First Amendment is violated when a prosecution motivated by the defendant's speech is supported by probable cause, but whether officers "may be liable" for retaliatory prosecution when there was probable cause for the charges. Pet. I.

[5] *Swint* v. *Chambers County Commission*, 514 U.S. 35 (1995), on which respondent relies (Br. 38-39), is not to the contrary. It was undisputed in *Swint* that the denial of the county commission's summary judgment motion was not "inextricably intertwined" with the denial of the police officers' request for qualified immunity. 514 U.S. at 51. The same cannot be said, however, of the questions at issue here. See *Nebraska Beef*, 398 F.3d at 1083.

II. THERE WAS PROBABLE CAUSE FOR THE CHARGES AGAINST RESPONDENT

Respondent acknowledges (Br. 13, 16, 44, 50) that, if the absence of probable cause is an element of a claim of retaliatory prosecution, petitioners are entitled to qualified immunity as long as a law enforcement officer could reasonably have believed that there was probable cause for the charges. See *Hunter* v. *Bryant*, 502 U.S. 224, 228-229 (1991) (per curiam); *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). Respondent contends, however, that petitioners "could not reasonably have believed[] that there was probable cause to prosecute [him]." Br. 44. That contention is without merit.

Respondent relies on the fact that "the known conspirators" did not admit that they "ever told [respondent] * * * about the payments at the core of the conspiracy." Br. 45. Contrary to respondent's contention, however, petitioners have never "fail[ed] to acknowledge" that fact. *Ibid.* As explained in our opening brief, the basis for the charging decision was not testimony from co-conspirators, but the "considerable circumstantial evidence" that respondent knowingly participated in the criminal schemes. Pet. Br. 4; see *id.* at 4-7, 39-41 (describing evidence). It is hardly unusual for a complex fraud conspiracy prosecution to be based mainly, or even entirely, on circumstantial evidence. See *id.* at 38. As this Court has observed, moreover, "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 100 (2003) (quoting *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 508 n.17 (1957)).[6]

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[6] Respondent contends that most of the evidence identified in petitioners' opening brief "purports to show [his] knowledge of the conspiracy," and that "mere knowledge of a conspiracy is insufficient to create criminal liability." Br. 46; see also *id.* at 44. But criminal intent "can rarely be proved by direct evidence," *Bailey* v. *Alabama*, 219 U.S. 219, 233 (1911), and knowledge of a conspiracy can be circumstantial evidence of membership in it, particularly when, as in this case, the person with

Respondent also challenges the circumstantial evidence on which petitioners relied (Resp. Br. 47-50), but in so doing he asks the Court to consider each item of evidence in isolation. He argues, for example, that there was "nothing suspicious" about one piece of evidence (Br. 47); that a second did "not suggest anything illegal" (*ibid.*); that there was "nothing remotely suspicious" about a third (Br. 48); that a fourth had an "innocent explanation" (Br. 49); and that a fifth was "innocuous" (*ibid.*). Such consideration of each item of evidence "in isolation" is "mistaken in light of [this Court's] precedents," *Maryland* v. *Pringle*, 540 U.S. 366, 372 n.2 (2003), which "preclude[] this sort of divide-and-conquer analysis," *United States* v. *Arvizu*, 534 U.S. 266, 274 (2002). While a piece of evidence, by itself, may be "innocuous," *Pringle*, 540 U.S. at 372 n.2, "readily susceptible to an innocent explanation," *Arvizu*, 534 U.S. at 274, "not illegal," *United States* v. *Juvenile TK*, 134 F.3d 899, 903 (8th Cir. 1998), or "not suspicious," *United States* v. *Caldwell*, 423 F.3d 754, 761 (7th Cir. 2005), the question whether there is probable cause must "take into account the 'totality of the circumstances,'" *Arvizu*, 534 U.S. at 274; accord *Pringle*, 540 U.S. at 372 n.2. Based on the totality of the circumstances in this case, see Pet. Br. 4-7, 39-41, petitioners could reasonably have believed that there was probable cause to charge respondent.[7]

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knowledge is a beneficiary of the criminal agreement. See, *e.g.*, *United States* v. *Ranum*, 96 F.3d 1020, 1026 (7th Cir. 1996) ("[P]roof that the defendant had both a motive and an opportunity to deceive the Government provides powerful circumstantial evidence that he acted with the requisite intent."), cert. denied, 519 U.S. 1094 (1997).

[7] Respondent's other arguments concerning probable cause are also without merit.

Respondent asserts that the allegation that he conspired with William Spartin to conceal Spartin's association with Gnau & Associates Inc. (GAI) and Recognition Equipment, Inc. (REI) was "spurious," because, he says, the evidence demonstrated that Spartin openly held himself out to the Postal Service as president of GAI, and that respondent knew that this

III. RESPONDENT'S ASSERTIONS ABOUT THE EVIDENCE CONCERNING PETITIONERS' MOTIVES ARE INACCURATE

Petitioners have consistently denied that they had a retaliatory motive. Although factual issues about petitioners' motives are not now before it, the Court should not be left with a mistaken impression of the record.

For example, respondent erroneously relies (Br. 4) on the fact that he was questioned, and asked to produce records, about lobbying, political contributions, and other activities protected by the First Amendment. Those investigative steps were perfectly appropriate, inasmuch as petitioners were investigating the corruption of a public official who received a portion of the money that REI had spent on lobbying. See *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993)

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was so. Br. 45. Far from openly holding himself out as GAI's president, Spartin sought to cover up his affiliation with GAI and REI by backdating a resignation letter and enlisting respondent to assist with a false cover story. J.A. 85, 307.

Respondent also contends that he received information from closed sessions of the Postal Service's Board of Governors "through legitimate congressional channels," and that petitioners were aware of that fact. Br. 48. While respondent may have received information through "congressional channels" before REI retained GAI, J.A. 159, 304, that does not necessarily render such access to confidential Postal Service information "legitimate." In any event, GAI's Michael Marcus admitted that Peter Voss leaked confidential Postal Service information to him and that he passed it on to REI officials. J.A. 68-69, 126.

Finally, respondent asserts that petitioners "concede[d] in a contemporaneous writing that, in their view, their evidence showed that REI, *'but not MOORE . . . individually*, w[as] aware of Voss' corrupt actions.'" Br. 45 (quoting J.A. 333); see also *id.* at 6, 50. The memo to which respondent refers, however, did not address what the "evidence showed." It addressed only what John Gnau, Marcus, and others could "conclusively testify"—*viz.*, that REI, but not Moore individually, was aware of the scheme. J.A. 333. In any event, the issue is not whether petitioners subjectively believed that the charges were supported by probable cause, but whether "it was objectively legally reasonable" to believe that they were. *Anderson* v. *Creighton*, 483 U.S. at 641.

("The First Amendment * * * does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").

In a similar vein, respondent errs in asserting (Br. 6) that a memo titled "Arguments for Indicting the Corporation" (J.A. 329-334) identified REI's media and political campaign as the first justification for indicting the company (J.A. 329-330). The memo merely identified that campaign as one of nine "bases" for the "conclusion" that "[t]his is a case of an underlying corrupt management strategy to obtain [Postal Service] business rather than the isolated and independent overzealous actions of two corporate officers." J.A. 329-332. Likewise, while respondent claims (Br. 6-7) that a "Details of the Offense" memo (J.A. 301-328) treated respondent's lobbying and media activities as criminal, the memo treated those activities merely as one aspect of an overall "corrupt corporate management strategy" (J.A. 329).

Respondent also asserts that, in an "unprecedented move," petitioners aggressively urged the United States Attorney to charge respondent, Robert Reedy, and REI. Br. 7. But it is hardly unusual for an investigative agency to urge a prosecutor's office to file charges when the agency believes that its investigation has uncovered evidence of a crime. Nor is there anything unusual about the fact that the Chief Postal Inspector wrote letters to the United States Attorney requesting a decision on whether charges would be filed. See J.A. 242. The case involved a corrupt member of the Postal Service's Board of Governors, a Presidential appointee, and the very first allegation of possible wrongdoing on his part was made directly to the Chief Inspector by the Deputy Postmaster General. J.A. 114.

Finally, respondent is mistaken in his assertion (Br. 8, 46) that petitioners engaged in misconduct before the grand jury. There was nothing improper about using summary statements of witnesses, which provide "an economical and expedient means of presenting evidence to a grand jury,"

United States v. *Al Mudarris*, 695 F.2d 1182, 1187 (9th Cir.), cert. denied, 461 U.S. 932 (1983), particularly since the summaries were adopted by the witnesses under oath and the prosecutor and grand jurors had an opportunity to ask follow-up questions, J.A. 105.[8]

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For the foregoing reasons, as well as those stated in petitioners' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

NOVEMBER 2005

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[8] Contrary to respondent's assertion, petitioners did not prevent Frank Bray from "correct[ing]" his statement. Resp. Br. 8. When Bray's counsel wanted to include a particular paragraph, petitioners referred the matter to the prosecutor, who reached an agreement with counsel under which the paragraph would be deleted but the prosecutor would consider asking certain questions before the grand jury that were suggested by Bray's lawyers. J.A. 106, 424-425. Nor did petitioners "attempt[] to coerce" Spartin into incriminating respondent. Resp. Br. 8. Petitioners confronted Spartin, who had signed a non-prosecution agreement, about several matters as to which they believed he was being untruthful, but none involved whether respondent had been told about the kickback payments to Voss. J.A. 93-95, 129-130. And the reason Spartin was shown excerpts of other witnesses' statements was that his lawyer claimed a need to refresh Spartin's recollection and the prosecutor agreed to provide the excerpts. J.A. 96-97, 107-108. Finally, while Spartin did opine in his grand jury testimony that respondent knew about the kickbacks to Voss, the prosecutor cautioned the grand jury that very same day that respondent's knowledge was "a very difficult question." J.A. 102.

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No. 04-1495

IN THE

Supreme Court of the United States

MICHAEL HARTMAN, *et al.*,
Petitioners,

v.

WILLIAM G. MOORE, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether law enforcement agents may be liable in a *Bivens* action for retaliatory prosecution in violation of the First Amendment when the prosecution was supported by probable cause.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state and local governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

The court of appeals held that a First Amendment retaliatory prosecution claim for damages can be pursued against petitioner law enforcement officers even though they had probable cause to believe that respondent had committed several serious crimes. While this case involves a *Bivens* action and was brought against federal law enforcement officers, the holding below establishes a rule of constitutional law which subjects state and local officials to liability under 42 U.S.C. § 1983. Indeed, because the vast majority of criminal proceedings are initiated by state and local officials, their potential liability is substantial. *Cf. United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) ("The States possess primary authority for defining and enforcing the criminal law.") (internal quotations and other citations omitted).

Beyond this, the judgment below undermines "obvious policies of the law in favor of encouraging proceedings against those who are apparently guilty." W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* § 119, at 876 (5th ed. 1984). It is in the public interest that law enforcement officers and other government officials refer cases of suspected criminal conduct to prosecutors for them to determine whether a prosecution is warranted. The court of appeals' holding that a retaliatory prosecution claim can be brought if the prosecution was based on "weak probable

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[1] The parties have consented to the filing of this *amicus curiae* brief and their letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

cause" offers no guidance to law enforcement officers who, having found evidence of a crime committed by a person who engaged in protected activity, must decide whether to refer the case to the prosecutor. It will discourage law enforcement officers and other officials from pursuing the prosecution of serious crimes.

Because of the importance of the issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

Probable cause is the "long-prevailing standard[]" applied by the courts to determine whether a person has been subjected to an unwarranted criminal prosecution. *Brinegar v. United States*, 338 U.S. 160, 176 (1949). The court of appeals nonetheless held that law enforcement officers can be sued for retaliatory prosecution even if they had probable cause to believe the plaintiff had committed a crime. Because this holding will lead to unwarranted and intrusive judicial scrutiny over prosecutorial and law enforcement decision-making and is unnecessary to protect First Amendment interests, the judgment of the court of appeals should be reversed.

1. The enforcement of the criminal law is one of the fundamental ways in which the executive branch of government exercises its constitutional powers. The Court has therefore recognized that prosecutors have broad discretion in enforcing the criminal law. Accordingly, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (internal quotations and citation omitted).

Courts are reluctant to review prosecutorial decision-making for two reasons. First, the courts lack competence to second-guess such factors as a prosecution's deterrence value and the relationship of a case to the government's enforcement priorities. Second, judicial scrutiny of prosecutorial decisionmaking would unduly intrude on a core function which the Constitution vests in a coordinate branch of government.

The court of appeals asserted that its rule "comports with the . . . framework" of this Court's decision in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977). Pet. App. 15a. But *Mt. Healthy* did no more than establish a rule of causation as it was clear that protected conduct was a motivating factor in the school board's decision to terminate the teacher's contract. Most significantly, *Mt. Healthy* explained that its rule is context-specific. The fundamental differences between prosecutorial and employment decision-making render reliance on *Mt. Healthy* inappropriate in retaliatory prosecution cases.

While the court of appeals acknowledged that "the criminal context . . . involves considerations of prosecutorial discretion absent in a school employment decision," *id.* at 16a, it nonetheless engaged in an intrusive inquiry into the U.S. Attorney's decision to seek respondent's indictment. Based on an internal memorandum of two officials in the U.S. Attorney's office that observed that the prosecution would be "complicated" and "consume significant resources," *id.* at 26a, the court concluded that these factors were probative of the postal inspectors' hostility towards respondent's First Amendment rights. *See id.* at 28a.

It is altogether unclear why the factual complexity and cost of prosecuting the case was probative of the inspectors' motivation. Indeed, when probable cause supports criminal charges, a court exceeds its authority when it scrutinizes the internal deliberations of the prosecutor's office.

Moreover, a legal rule which results in this type of inquiry would have serious adverse consequences because it will chill candid discussion within the prosecutor's office of the merits of a case. A frank discussion of such factors as the strength and weaknesses of the government's evidence, as well as the costs and benefits of bringing the case, is essential to the proper exercise of prosecutorial discretion. The holding of the court of appeals thus violates separation of powers principles because it "interfere[es] with a coequal branch's ability to discharge its constitutional responsibilities." *Cheney v. District Court*, 124 S.Ct. 2576, 2588 (2004) (citation omitted).

2. The court of appeals held that "[a] *Bivens* recovery remains possible . . . in those rare cases where strong motive evidence combines with *weak probable cause* to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus." Pet. App.19a-20a (emphasis added). This Court should reject this rule as unworkable.

The court of appeals did not explain how to identify what constitutes "weak probable cause" or "quite weak indicators of probable cause." *Id.* at 20a. Indeed, the court's approach provides no guidance either to trial courts ruling on retaliatory prosecution claims or to law enforcement officers, who having obtained evidence of criminal activity by a person who engaged in protected activity, must determine whether to refer a case to the prosecutor.

Probable cause has long been the standard used by the courts to determine whether a person was subjected to an unwarranted criminal prosecution. It is the standard which the prosecution must establish before a grand jury to obtain an indictment. As one of the elements of the claim of malicious prosecution, it is also one of the standards long applied by the courts in assessing whether a person was subjected to an unjustified prosecution. *See* W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 119, at 876 (5th ed. 1984).

There is a compelling public interest in bringing criminals to justice. This interest is not diminished because a suspect has at some point engaged in protected activity. The public interest would be seriously jeopardized by a rule which subjects law enforcement officials to liability, notwithstanding the existence of probable cause, for referring a case of criminal conduct to the prosecutor. Under the court of appeals' approach, it will no longer be enough for law enforcement officers to have acted in an objectively reasonable manner when referring a case to the prosecutor's office. Nor will it be enough for law enforcement officers to rely on the professional judgment of a prosecutor that the evidence is sufficient to support a criminal charge. The holding below thus discourages law enforcement officers from forwarding cases of suspected criminal conduct to the prosecutor.

In support of its holding the court of appeals reasoned that "were courts to demand no more than a showing of probable cause . . . law enforcement officers could freely bring marginal cases." Pet. App. 16a. This assertion is plainly erroneous because it ignores that it is the prosecutor who, exercising independent judgment, makes the ultimate decision to seek an indictment and determines whether the evidence is sufficient to support the charge. Prosecutors typically have no interest in trying marginal cases; on the contrary, they have a substantial interest in ensuring that cases taken to trial will result in a conviction. The holding below also disregards the role of grand juries in "determin[ing] whether a charge is founded upon reason or was dictated . . . by malice." *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

In short, the ordinary procedures of the criminal law and the probable cause standard have long provided adequate protection against unfounded criminal charges and prosecutions prompted by personal animus or hostility to protected activity. The court of appeals offered no convincing explanation why these procedures and the probable cause

standard do not protect First Amendment rights. Its judgment should therefore be reversed.

ARGUMENT

THE EXISTENCE OF PROBABLE CAUSE DEFEATS A RETALIATORY PROSECUTION CLAIM

The court of appeals ruled that respondent could pursue his claim that petitioners violated the First Amendment when they pursued his criminal prosecution notwithstanding that "the officers involved acted on the basis of probable cause." Pet. App. 19a. The court held that a cause of action for retaliatory prosecution exists "where strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus." *Id.* at 20a. It thus rejected petitioners' contention that they were entitled to qualified immunity.

In so holding, the court below reasoned that its "approach . . . comports with the . . . framework in *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977)." *Id.* at 15a. But *Mt. Healthy* made clear that its rule of causation was context specific and there was no dispute that the employment decision at issue therein was based in part on the teacher's protected speech. More importantly, if adopted by this Court, the holding below will lead to unwarranted and intrusive judicial scrutiny over prosecutorial and law enforcement decisionmaking while doing little to advance First Amendment values. Although this case involves a federal prosecution, its ruling would undoubtedly be applied to suits brought under 42 U.S.C. § 1983 challenging prosecutions initiated by state and local law enforcement officers. *See* Pet. 13; *cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.30 (1982) (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)). The judgment of the court of appeals should therefore be reversed.

A. The Court of Appeals' Holding Impairs The Prosecution of Crimes, A Core Executive Function

The enforcement of the criminal law is one of the fundamental ways in which the executive branches of federal and state governments exercise the power vested in them by their respective constitutions. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). As the Court has stated, the decision to prosecute "has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" *Heckler*, 470 U.S. at 832 (quoting U.S. Const. art. II, § 3).

The Court has accordingly recognized that prosecutors have "'broad discretion'" in enforcing the criminal law. *Armstrong*, 517 U.S. at 464 (citations omitted). A "'presumption of regularity supports' their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" *Id.* (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)). Thus, "'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" *Id.* (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

Judicial reluctance to review prosecutorial decisionmaking is grounded in the courts' lack of competence to scrutinize prosecutorial decisions. Indeed, this Court has acknowledged that "'[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to

undertake.'" *Id.* at 465 (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).[2] As the National District Attorneys Association has explained:

> The exercise of prosecutorial discretion in the screening, charging, and diversion decisions are not only integral parts of the American criminal justice system but are also *the most important aspect of the prosecutorial function* . . . . Such discretionary action is induced by scarcity of investigative and prosecutorial resources, by legislative over-generalization, and by low enforcement priority of some violations.

National District Attorneys Association, *National Prosecution Standards* 127 (2d ed. 1991) (emphasis added).

It is also based on the recognition that judicial scrutiny of prosecutorial decisionmaking would unduly intrude on a core function which the Constitution vests in a coordinate branch of government. "'Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement

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[2] Prosecutors may consider numerous factors in deciding whether to charge. These include "[t]he probability of conviction," "[t]he nature of the offense," "[t]he characteristics of the offenders," "[p]ossible deterrent value of prosecution to the offender and society in general," "[l]ikelihood of prosecution by another criminal justice authority," "[t]he willingness of the offender to cooperate with law enforcement," "[a]id to other criminal justice goals through non-prosecution," "[t]he interests of the victim," "[p]ossible improper motives of a victim or witness," "[t]he availability of adequate civil remedies," "[t]he age of the offense," "[u]ndue hardship caused to the accused," "[a] history of non-enforcement of a statute," "[e]xcessive cost of prosecution in relation to the seriousness of the offense," "[r]ecommendations of the involved law enforcement agency," and "[a]ny mitigating circumstances." National District Attorneys Association, *National Prosecution Standards* 130-31 (2d ed. 1991) (Std. 43.6).

policy.'" *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 607).

True enough, the Court has recognized that "a prosecutor's discretion is 'subject to constitutional constraints.'" *Id.* at 464 (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)). A prosecutorial decision thus "may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.* (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). Nor can a charge be filed solely because a person "non-provocatively voic[ed]" his objection to a police officer's conduct. *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973) (per curiam). The Court, however, has never held that a First Amendment retaliatory prosecution claim can be maintained when probable cause supported the criminal charges.

While the court of appeals asserted that its approach "comports with [this Court's] framework in *Mt. Healthy*," Pet. App. 15a, that case does not support the holding below. *Mt. Healthy* involved a claim that a school board had failed to renew a teacher's contract because of the teacher's protected speech. *See* 429 U.S. at 281-82. There was no dispute that the decision was based on the teacher's protected conduct as the board's termination statement expressly referenced his speech. *Id.* at 282-84 & n.1. *Mt. Healthy* thus does no more than set forth a "rule of causation," *id.* at 285, under which an employee must first "show that his conduct was constitutionally protected, and that this conduct . . . was a 'motivating factor' in the Board's decision not to rehire him." *Id.* at 287 (footnote omitted). Only after the employee made this showing was the Board required to prove "that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.* As *Mt. Healthy* explains, while vindicating the constitutional principle is important, "an employee [should not be placed] in a better position as a result of the exercise of constitutionally

protected conduct than he would have occupied had he done nothing." *Id.* at 285.

Most significantly, *Mt. Healthy* did not establish a broad rule applicable to all First Amendment claims. Indeed, *Mt. Healthy* made clear that its rule is context specific. *See id.* at 287 ("the proper test to apply in *the present context* is one which . . . protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights") (emphasis added). Beyond the fact that the *Mt. Healthy* rule was articulated where it was undisputed that protected conduct played a substantial part in the decision not to renew the teacher's contract, the differences between prosecutorial and employment decisionmaking are so deep and fundamental as to render *Mt. Healthy* inapplicable in cases that involve the exercise of prosecutorial discretion.

While public education is an important governmental function, it is typically not carried out by constitutional officers (and their appointees) such as prosecutors, who are vested with extraordinary discretion in deciding how to perform their duties. *See* pp. 7-9 *supra*. While the court of appeals purported to acknowledge that "the criminal context . . . involves considerations of prosecutorial discretion absent in a school employment decision," Pet. App.16a, the court did no more than pay lip service to the principle. As this case demonstrates, adoption of the lower court's holding would result in intrusive judicial scrutiny of decisionmaking which the Federal Constitution commits to a coordinate branch of government. *See Heckler*, 470 U.S. at 832.

Here, for example, the court of appeals held that respondent had stated a violation of the First Amendment based in part on evidence that "the U.S. Attorney's Office warned that the case would be 'complicated' and 'consume significant resources'—considerations that, under normal circum-

stances, might weigh against prosecuting a marginal case."[3] Pet. App. 28a. The court further reasoned that "this combination of factors—complexity and expense plus strong indications of retaliation and weak evidence of probable cause—suggests not only that hostility to free expression was at least a motivating factor in Moore's prosecution, but also that the inspectors may be unable to rebut that inference." *Id.*

The court's approach is problematic for several reasons. First, it is altogether unclear why the conclusions of the senior *prosecutors* that the case was "complicated" and would "consume significant resources," *id.*, are probative of the *inspectors*' hostility to Moore's First Amendment rights. Second, if a retaliatory prosecution claim can be brought even when there is probable cause to support the prosecution, it is likely that the internal deliberations of the prosecutor's office will be subject to judicial scrutiny as occurred here. Such materials as the internal memoranda (which were quoted by the court of appeals) might be subject to discovery; and even if that were not so, the prosecutor's office might feel compelled to submit such documents either because of external pressure or to support a summary judgment motion filed on behalf of the defendants. Indeed, prosecutors might themselves be subject to depositions inquiring into their reasons for bringing a case, thus distracting them from their duties and interfering with the exercise of their professional judgment.

It is difficult to understand how the interests of justice are served by rule which invites judicial inquiry into prosecutorial decisionmaking. Especially in complex criminal cases such as this one, a frank discussion of such factors as

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[3] The court of appeals' assertion that "[t]he U.S. Attorney's Office warned that the case would be 'complicated,' and 'consume significant resources,'" Pet. App. 28a, misstates the record. While that was the conclusion of two officials in the office, *see id.* at 26a, obviously others in the office believed that the case warranted prosecution.

the strength and weaknesses of the government's evidence, as well as the costs and benefits of bringing the case, is absolutely essential to the proper exercise of prosecutorial discretion. Whether such materials as the memos are discoverable (as they may become if this Court adopts the holding below) or voluntarily offered by the government in defense of itself or its officials, the consequence of the court of appeals' holding will be the same—to chill candid discussion of such cases by reviewing personnel in the prosecutor's office.

Beyond that, it is not a proper concern of the courts that a prosecution is "complicated" or will "consume significant resources." *Id.* White collar criminal cases, especially those involving public corruption, typically are complicated and consume significant resources. Whether such cases merit prosecution is a determination which is the Executive Branch's to make in light of its enforcement priorities. The holding of the court of appeals will thus result in repeated and unwarranted judicial intrusions into the internal deliberations of the Executive Branch, a development which violates separation of powers principles because it "interfer[es] with a coequal branch's ability to discharge its constitutional responsibilities."[4] *Cheney v. District Court*, 124 S.Ct. 2576, 2588 (2004). As the Court has recognized, "[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Clinton v. Jones*, 520 U.S. 681, 701 (1997) (internal quotations and

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[4] While this case involves the relationship between branches of the Federal Government, the holding below raises equally troublesome questions regarding federal-state relations. *Cf. Younger v. Harris*, 401 U.S. 37, 44 (1971) ("[T]he National Government, anxious though it may be to vindicate federal rights and interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.").

citations omitted). *See also Armstrong*, 517 U.S. at 465 (judicial reluctance to review prosecutorial decisionmaking "stems from a concern not to unnecessarily impair the performance of a core executive constitutional function"). These principles require reversal of the judgment below.

B. Probable Cause And The Procedures Of Criminal Law Provide Adequate Protection Against Retaliatory Prosecutions

The court of appeals held that "damages liability [exists] for prosecutions that would not have occurred without retaliatory motive, even if the officers involved acted on the basis of probable cause." Pet. App. 19a. The court explained that "[t]his theory of liability . . . is limited," because the existence of probable cause "will be enough in most cases to establish that prosecution would have occurred absent bad intent." *Id.* The court nonetheless held that "[a] *Bivens* recovery remains possible . . . in those rare cases where strong motive evidence combines with *weak probable cause* to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus." *Id.* at 19a-20a (emphasis added).

In contrast to a test that inquires into the existence *vel non* of probable cause, the court's rule is inherently subjective and unworkable. The court did not explain what constitutes "weak probable cause" or "quite weak indicators of probable cause," *id.*, so that a trial court could apply these amorphous standards in future cases. Nor did the court explain why the long-existing, objective probable cause standard as articulated by this Court in numerous cases is inadequate to protect against abusive prosecutions. *See Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (discussing the "long-prevailing standards" of probable cause).

The court of appeal's "know it when [we] see it approach," *cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J.,

concurring), likewise offers no guidance to law enforcement officers who, having found evidence of a crime committed by someone who engaged in protected activity, must determine whether to pursue a criminal prosecution.[5] Knowing that they can be held liable if a subsequent criminal prosecution fails notwithstanding the existence of probable cause, criminal investigators will refrain from forwarding cases to prosecutors, thereby undermining public policy that those suspected of criminal activity be prosecuted.

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[5] The court's conclusion that there was "weak probable cause," Pet. App. 20a, is based on a mischaracterization of the record. According to the court, it was "the opinion of the Chief and Deputy Chief of Special Prosecutions . . . that the evidence was 'questionable.'" *Id.* at 27a. In fact, these two senior prosecutors had concluded "that 'there is enough evidence to get by'" a motion for judgment of acquittal. *Id.* at 26a (quoting memorandum of Chief and Deputy Chief of Special Prosecutions to U.S. Attorney). What was "questionable" in the view of these officials was "the chances of convicting Moore, Reedy, and REI." *Id.* That conclusion was hardly surprising given that the case alleged a conspiracy, was factually complex, and was based entirely on circumstantial evidence. *Id.*

The senior prosecutors' conclusion that there was enough evidence to defeat a motion for judgment of acquittal does not support the court's view that there was weak probable cause. A motion for judgment of acquittal requires a trial court to determine whether "the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt." *Burks v. United States*, 437 U.S. 1, 16 (1978) (collecting cases and other authorities). This standard is plainly more exacting than that of probable cause, which requires a reasonable objective basis to believe that a suspect has committed a crime and can be based on evidence (such as hearsay) which is not admissible in court. *See, e.g., Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ornelas v. United States*, 517 U.S. 690, 695 (1996)); *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979); *Gerstein v. Pugh*, 420 U.S. 103, 120-21 (1975); *Bostic v. City of Chicago*, 981 F.2d 965, 968-69 (7th Cir. 1992), *cert. denied*, 509 U.S. 923 (1993). Thus, if in the view of two senior officials, the government's case was strong enough to defeat a motion for a judgment of acquittal, the evidence well exceeded the standard of probable cause.

Probable cause has long been the standard applied by the courts to assess whether a person has been subjected to an unwarranted criminal prosecution. *See Brinegar*, 338 U.S. at 175-76. As the Court explained in *Brinegar*, this "long-prevailing standard[] . . . safeguard[s] citizens from . . . unfounded charges of crime." *Id.* at 176. Thus, the grand jury's responsibilities "include . . . the determination whether there is probable cause to believe a crime has been committed." *United States v. Calandra*, 414 U.S. 338, 343 (1974) (citing *Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1974)).[6] Correspondingly, "the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied [as to the existence] of probable cause." *Gerstein*, 420 U.S. at 121 n.22 (collecting authorities).

Thus, while the common law recognizes a cause of action for malicious prosecution, it has always required that the plaintiff prove not only that "the charge was made maliciously," but that it was also made "without probable cause."

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[6] This case involved the additional protection of indictment by a grand jury. Pet. 6. For centuries the grand jury has served the vital function of protecting the accused from malicious and oppressive criminal prosecutions. *See Wood v. Georgia*, 370 U.S. 375, 390 (1962). As the Court explained in *Wood*:

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

Id. *See also Calandra*, 414 U.S. at 343 ("The scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement.").

Munns v. De Mours, 17 F. Cas. 993, 995 (C.C.D. Pa. 1811). As a leading authority explains, this cause of action

> has never been regarded with any favor by the courts, and it is hedged with restrictions which make it very difficult to maintain. Chief among these is the requirement that the plaintiff must sustain the burden of proof that the criminal proceeding was initiated or continued by the defendant without 'probable cause.' This is true even though the defendant is found to have acted with 'malice,' for an improper purpose, since it is the part of a good citizen to bring about the prosecution of those who are reasonably suspected of crime, and the addition of a personal motive should not result in liability for performing a public obligation. The existence of such 'malice' does not create even an inference that probable cause was lacking.

W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 119, at 876 (5th ed. 1984) (footnotes omitted).

Similarly, in defining the elements of the action, the *Restatement* instructs that "[a] private person who intitiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if . . . he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice." 3 *Restatement (Second) of Torts* § 653 (1977). The *Restatement* further explains that "the burden is upon the plaintiff to prove both the absence of probable cause and the improper purpose for which the proceedings were initiated." *Id.* § 652, at 406 (Introductory Note). *See also* Stuart M. Speiser, *et al.*, 8 *The American Law of Torts* § 28.7, at 38 & n.54 (1991) ("[I]t is fundamental that lack or want of probable cause is an essential element for successful pursuance of such an action.") (collecting cases).

Malicious prosecution actions are disfavored because they run "counter to obvious policies of the law in favor of encouraging proceedings against those who are apparently guilty, and letting finished litigation remain undisturbed and unchallenged." *Prosser & Keeton*, *supra*, § 119, at 876. As this authority explains: "The law supports the use of litigation as a social means for resolving disputes, and it encourages honest citizens to bring criminals to justice. Consequently the accuser must be given a large degree of freedom to make mistakes and misjudgments without being subjected to liability." *Id.* § 119, at 871. The common law also recognizes that "no one should be permitted to subject a fellow citizen to prosecution for an improper purpose and without an honest belief that the accused may be found guilty." *Id.* The probable cause element thus serves the vital purpose of balancing the "[t]he individual interest in freedom from unjustifiable litigation and the social interest in supporting resort to law." *Id.*

This Court has recognized the same principle with respect to constitutional claims. In *Pierson v. Ray*, 386 U.S. 547 (1967), the Court held that the defense of probable cause was available in an action brought under 42 U.S.C. § 1983. *See id.* at 557. The Court explained, "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Id.* at 555.

There is a compelling public interest in bringing criminals to justice. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 560-61 (1978) (recognizing "the fundamental public interest in implementing the criminal law"); *see also Prosser & Keeton*, *supra*, § 119, at 876. This interest is not diminished because a suspect has at some point engaged in protected activity. Indeed, in *Pierson*, where the Court first recognized the defense of qualified immunity, the suit sought damages for the unconstitutional arrests of persons who had engaged in

protected activity. *See Pierson*, 386 U.S. at 552-53; *cf. Harlow*, 457 U.S. at 804-05, 807 (recognizing qualified immunity in suit bringing retaliation claim).

The prosecution of many serious and complex crimes, particularly where the defendants are highly visible figures (such as in public and corporate corruption cases) would be especially harmed by a rule which allows a claim of retaliatory prosecution to go forward even when law enforcement officials had probable cause to believe a crime was committed. In many of these cases, an acquitted defendant could easily claim that the prosecution was motivated by a desire to retaliate against him for engaging in protected activity. Indeed, the rule adopted by the court of appeals encourages the pleading of borderline "speech" as "protected" activity in order to support otherwise frivolous claims of retaliatory prosecution.[7] By subjecting law enforcement officials to potential liability for referring a case to the prosecutor, even when probable cause exists, the court of appeals' rule will discourage law enforcement from pursuing the prosecution of serious crimes. It thus undermines the strong public interest in having law enforcement officers present cases of criminal conduct to prosecutors.[8]

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[7] *See, e.g., Smithson v. Aldrich*, 235 F.3d 1058, 1060, 1063 (8th Cir. 2000) (bar owner alleged that police violated First Amendment when they arrested and charged him "not to enforce city's sound ordinance, but because of [the police's] disagreement with his statements to the crowd challenging the decision to stop the music" after 11 p.m. expiration of permit for outdoor concert).

[8] Nor is this concern limited to law enforcement. Any public official could be sued for referring a case to law enforcement officers, notwithstanding the existence of probable cause. *See Mozzochi v. Borden*, 959 F.2d 1174, 1175-80 (2d Cir. 1992) (suit against town manager who reported to police plaintiff's threats of violence).

The assurance of the court below that "[t]his theory of liability . . . is limited" because the existence of probable cause "will be enough in most cases to establish that prosecution would have occurred absent bad intent," Pet. App. 19a, provides cold comfort to criminal investigators. Under the court's rule, it will no longer be enough for law enforcement officers to have acted in an objectively reasonable manner when they refer a case to the prosecutor's office. *Cf. Devenpeck v. Alford*, 125 S.Ct. 588, 594 (2004) ("Subjective intent of the arresting officer, *however* it is determined . . . is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest."). Rather, to avoid liability, criminal investigators will have to demonstrate the existence of some form of heightened probable cause, a concept which has never been recognized by this Court. Nor, as this case illustrates, will it be enough to rely on the judgment of a prosecutor that the evidence is sufficient to support a criminal prosecution.

The court of appeals' rule ignores the respective roles of criminal investigators and prosecutors in investigating cases. Criminal investigators gather evidence; prosecutors decide whether to seek an indictment and whether the evidence is sufficient to support the charge. Indeed, as the internal review conducted by the U.S. Attorney's office demonstrates, the prosecutors exercised independent judgment in deciding to seek Moore's indictment. Prosecutors have a strong interest in ensuring that cases taken to trial are strong enough to obtain a conviction. That Moore's six-week trial did not result in a conviction does not justify subjecting petitioners, who had probable cause, to damages liability. The court of appeals' assertion that "were courts to demand no more than a showing of probable cause . . . law enforcement officers could freely bring marginal cases," Pet. App. 16a, is simply erroneous.[9]

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[9] Mischaracterizing petitioners' argument, the court of appeals further stated: "As the inspectors see it, constitutional free speech protections say

The court of appeals failed to explain why the probable cause requirement—which for centuries has been adequate to protect against unfounded criminal accusations brought for the gamut of malicious motives—does not protect those persons who allege that they were prosecuted because they engaged in protected activity. The court below also ignored the historic and continuing role of the grand jury "in insuring fair and effective law enforcement," *Calandra*, 414 U.S. at 343, and protecting suspects against accusations brought "by malice or personal ill will." *Hale v. Henkel*, 201 U.S. 43, 59 (1906).

According to the court of appeals, its rule "allows the government to proceed with prosecutions that, though motivated in part by hostility to *First Amendment* activity, can be justified on legitimate grounds. When hostility to speech represents a but-for cause of the prosecution, however, the charges are 'deliberately based upon an unjustifiable stan-

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nothing about prosecutions brought only because the defendant is, say, a peace activist, a Klan member, a Democrat, or a Republican." *Id.* at 17a.

Law enforcement officers, however, do not have the final say as to whether a criminal prosecution is commenced—the prosecutor does. Moreover, if probable cause exists, then a prosecution clearly has not been "brought only because the defendant is . . . a Klan member." Indeed, *amici* are mindful of the history of the civil rights struggle and that some Klan members—consistent with the views of the Klan—engaged in criminal activity including lynchings, the murders of civil rights workers and bombing of churches. There were a number of prosecutions of Klan members who committed these acts that did not result in convictions. *See* Howard Ball, *Murder in Mississippi:* United States v. Price *and the Struggle for Civil Rights* 132-34 (2004) (discussing federal trial of eighteen Klan members for conspiracy to violate the civil rights of murdered civil rights workers in Philadelphia, Mississippi, in which only seven defendants were convicted). Under the court of appeals' rule, the acquitted defendants in these cases could have brought retaliatory prosecution claims against the law enforcement officers who investigated the cases notwithstanding the existence of probable cause to believe that the defendants had committed the charged crimes.

dard.'" Pet. App. 17a (quoting *Wayte v. United States*, 470 U.S. at 608.).[10]

This reasoning is flawed. First of all, under the court's rule it is not the government but rather its officials upon whom liability is imposed. Moreover, it is the investigators, who have only qualified immunity, not the prosecutors, who have absolute immunity, who are potentially liable. Furthermore, "hostility to speech" may be "a but-for cause of [a] prosecution" that results in a conviction. But if this is the test for determining whether "the charges are deliberately based upon an unjustifiable standard" that violates the Constitution, it suggests that prosecutions that are motivated by hostility to protected activity but which result in convictions also give rise to civil liability.[11]

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[10] *Amici* have previously shown that *Mt. Healthy* does not support the court of appeals' holding. The court of appeals' holding does not, however, comport with *Mt. Healthy* which requires far more than a showing of "but-for" causation. Rather, the plaintiff must show that his "constitutionally protected" conduct "was a 'motivating factor'" behind the governmental action. 429 U.S. at 287 (quoting *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 270-71 n.21 (1977)).

[11] The court of appeals maintained that its holding was based on circuit precedent. *See* Pet. App. 12a-16a. (discussing *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. 1987)). The plaintiff in *Haynesworth* "charge[d] that he was victimized by an unmerited prosecution," 820 F.2d at 1255, and that he was arrested without probable cause. *See id.* at n.76. The trial court dismissed the case on a 12(b)(6) motion. *See id.* at 1248. The court of appeals specifically noted that "it may be that there was no good reason for lodging the criminal charge against Haynesworth in the first place," and that "Haynesworth alleged that he was charged with disorderly conduct solely because he refused to release his civil claims against the arresting officers." *Id.* at 1257. Thus, it does not appear that *Haynesworth* raised the issue of whether a lack of probable cause was an element of the claim or whether the existence of probable cause could be raised by the defendants as an affirmative defense.

In a footnote, *Haynesworth* followed *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979), even though *Wilson* "set out the essential elements

The court of appeals was obviously not willing to go that far, presumably because of the compelling societal interest in punishing criminal conduct. *See* Pet. App. 19a (explaining that probable cause "will be enough in most cases to establish that prosecution would have occurred absent bad intent"). This interest, however, exists independently of the outcome of any one prosecution. *See* discussion *supra* at 16-18.

In short, established procedures of the criminal law and the probable cause standard as applied by prosecutors and grand juries have long provided adequate protection against unfounded criminal charges. The court of appeals gave no persuasive explanation why these safeguards do not adequately protect First Amendment rights. This Court should therefore reject the ruling below.

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of a retaliatory-prosecution claim in a § 1983 action *for injunctive relief*." 820 F.2d at 1257 n.93 (emphasis added). As this Court has recognized, suits for money damages against public officers present far different considerations than a suit seeking an injunction.

Significantly, neither the Eleventh nor the Fifth Circuits, the successor courts to the old Fifth Circuit, sustains a retaliatory prosecution claim where the charges are supported by probable cause. *See Keenan v. Tejada*, 290 F.3d 252, 260 (5th Cir. 2002) ("retaliatory criminal prosecutions in violation of the First Amendment are actionable only if a plaintiff can also prove the common-law elements of malicious prosecution, including the absence of probable cause to prosecute"); *Redd v. City of Enterprise*, 140 F.3d 1378, 1383-84 (11th Cir. 1998) (recognizing qualified immunity defense where officers had probable cause to arrest).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HARTMAN ET AL. *v.* MOORE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04–1495. Argued January 10, 2006—Decided April 26, 2006

Seeking to convince the United States Postal Service to incorporate multiline optical scanning technology, a company (REI), which manufactured multiline optical readers, commenced an extensive lobbying and public-relations campaign. In the end, the Postal Service begrudgingly embraced the multiline technology, but awarded the lucrative equipment contract to a competing firm. Subsequently, Postal Service inspectors investigated REI and its chief executive, respondent Moore, for their alleged involvement in a consulting-firm kickback scandal and for their alleged improper role in the search for a new Postmaster General. Urged at least in part by the inspectors to bring criminal charges, a federal prosecutor tried REI and its top officials. But, finding a complete lack of evidence connecting them to any wrongdoing, the District Court acquitted the defendants. Moore then filed an action under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, against the federal prosecutor and petitioner postal inspectors, arguing, as relevant here, that they had engineered the prosecution in retaliation for his lobbying efforts. The claims against the prosecutor were dismissed in accordance with the absolute immunity for prosecutorial judgment. Ultimately, the entire suit was dismissed, but the Court of Appeals reinstated the retaliatory-prosecution claim against the inspectors. Back in District Court, the inspectors moved for summary judgment, claiming that because the underlying criminal charges were supported by probable cause they were entitled to qualified immunity. The District Court denied the motion, and the Court of Appeals affirmed.

Held: A plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges. Pp. 5–15.

Syllabus

(a) As a general matter, this Court has held that the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out. *Crawford-El* v. *Britton*, 523 U. S. 574, 592. When nonretaliatory grounds are insufficient to provoke the adverse consequences, retaliation is subject to recovery as the but-for cause of official injurious action offending the Constitution, see, *e.g.*, *id.*, at 593, and a vengeful federal officer is subject to damages under *Bivens*. Pp. 5–6.

(b) Although a *Bivens* (or 42 U. S. C. §1983) plaintiff must show a causal connection between a defendant's retaliatory animus and subsequent injury in any retaliation action, the need to demonstrate causation in the retaliatory-prosecution context presents an additional difficulty which can be overcome by a showing of the absence of probable cause. In an ordinary retaliation case, the evidence of motive and injury are sufficient for a circumstantial demonstration that the one caused the other, and the causation is understood to be but-for causation, without which the adverse action would not have been taken. When the claimed retaliation is, however, a criminal charge, the action will differ in two ways. First, evidence showing whether there was probable cause for the criminal charge will be highly valuable circumstantial evidence to prove or disprove retaliatory causation. Demonstrating a lack of probable cause will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest that the prosecution would have occurred even without a retaliatory motive. Second, since the defendant in a retaliatory-prosecution case will not be the prosecutor, who has immunity, but an official who allegedly influenced the prosecutorial decision, the causal connection required is not between the retaliatory animus of one person and that person's own injurious action, as it is in the ordinary retaliation case, but between the retaliatory animus of one person and the adverse action of another. Because evidence of an inspector's animus does not necessarily show that the inspector induced the prosecutor to act when he would not have pressed charges otherwise and because of the longstanding presumption of regularity accorded prosecutorial decisionmaking, a showing of the absence of probable cause is needed to bridge the gap between the nonprosecuting government agent's retaliatory motive and the prosecutor's injurious action and to rebut the presumption. Pp. 6–13.

(c) The significance of probable cause or the lack of it looms large, being a potential feature of every case, with obvious evidentiary value. Though not necessarily dispositive, the absence of probable cause along with a retaliatory motive on the part of the official urging prosecution are reasonable grounds to suspend the presumption of

Syllabus

regularity behind the charging decision and enough for a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to go forward. Pp. 13–15.

388 F. 3d 871, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined. ROBERTS, C. J., and ALITO, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1495

MICHAEL HARTMAN, FRANK KORMANN, PIERCE McINTOSH, NORMAN ROBBINS, AND ROBERT EDWARDS, PETITIONERS *v.* WILLIAM G. MOORE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April 26, 2006]

JUSTICE SOUTER delivered the opinion of the Court.

This is a *Bivens* action against criminal investigators for inducing prosecution in retaliation for speech. The question is whether the complaint states an actionable violation of the First Amendment without alleging an absence of probable cause to support the underlying criminal charge. We hold that want of probable cause must be alleged and proven.

I

In the 1980's, respondent William G. Moore, Jr., was the chief executive of Recognition Equipment Inc. (REI), which manufactured a multiline optical character reader for interpreting multiple lines of text. Although REI had received some $50 million from the United States Postal Service to develop this technology for reading and sorting mail, the Postmaster General and other top officials of the Postal Service were urging mailers to use nine-digit zip codes (Zip + 4), which would provide enough routing information on one line of text to allow single-line scanning

machines to sort mail automatically by reading just that line.

Besides Moore, who obviously stood to gain financially from the adoption of multiline technology, some Members of Congress and Government research officers had reservations about the Postal Service's Zip + 4 policy and its [illegible]ded reliance on single-line readers. Critics maligned single-line scanning technology, objected to the foreign sources of single-line scanners, decried the burden of remembering the four extra numbers,[1] and echoed the conclusion reached by the United States Office of Technology Assessment that use of the single-line scanners in preference to multiliners would cost the Postal Service $1 million a day in operational losses.

Moore built on this opposition to Zip + 4, by lobbying Members of Congress, testifying before congressional committees, and supporting a "Buy American" rider to the Postal Service's 1985 appropriations bill. Notwithstanding alleged requests by the Postmaster General to be quiet, REI followed its agenda by hiring a public-relations firm, Gnau and Associates, Inc. (GAI), which one of the Postal Service's governors, Peter Voss, had recommended.

The campaign succeeded, and in July 1985 the Postal Service made what it called a "mid-course correction" and embraced multiline technology. Brief for Respondent 4. But the change of heart did not extend to Moore and REI, for the Service's ensuing order of multiline equipment, valued somewhere between $250 million and $400 million went to a competing firm.

Not only did REI lose out on the contract, but Moore and REI were soon entangled in two investigations by Postal

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[1] See, *e.g.*, Seaberry, Durenberger Begins Campaign Against Nine-Digit Zip Code, Washington Post, Feb. 24, 1981, p. E1 (describing Senator David Durenberger's reference to the Zip + 4 campaign as "'a mnemonic plague of contagious digititous'").

Service inspectors. The first looked into the purported payment of kickbacks by GAI to Governor Voss for Voss's recommendations of GAI's services, as in the case of REI; the second sought to document REI's possibly improper role in the search for a new Postmaster General. Notwithstanding very limited evidence linking Moore and REI to any wrongdoing, an Assistant United States Attorney decided to bring criminal charges against them, and in 1988 the grand jury indicted Moore, REI, and REI's vice president. At the close of the Government's case, after six weeks of trial, however, the District Court concluded that there was a "complete lack of direct evidence" connecting the defendants to any of the criminal wrongdoing alleged, and it granted the REI defendants' motion for judgment of acquittal. *United States* v. *Recognition Equip. Inc.*, 725 F. Supp. 587, 596 (DC 1989).

Moore then brought an action in the Northern District of Texas for civil liability under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971),[2] against the prosecutor and the five postal inspectors who are petitioners here (a sixth having died). His complaint raised five causes of action, only one of which is relevant here, the claim that the prosecutor and the inspectors had engineered his criminal prosecution in retaliation for criticism of the Postal Service, thus violating the First Amendment. In the course of these proceedings Moore has argued,

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[2] "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson* v. *Green*, 446 U. S. 14, 18 (1980). Though more limited in some respects not relevant here, a *Bivens* action is the federal analog to suits brought against state officials under Rev. Stat. §1979, 42 U. S. C. §1983. See *Wilson* v. *Layne*, 526 U. S. 603, 609 (1999); see also Waxman & Morrison, What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause, 112 Yale L. J. 2195, 2208 (2003) ("Section 1983 applies . . . to state and local officers, [and] the Supreme Court in *Bivens* . . . inferred a parallel damages action against federal officers").

among other things, that the postal inspectors launched a criminal investigation against him well before they had any inkling of either of the two schemes mentioned above, that the inspectors targeted him for his lobbying activities, and that they pressured the United States Attorney's Office to have him indicted. Moore also sought recovery from the United States under the Federal Tort Claims Act (FTCA). The District Court dismissed the claims against the Assistant United States Attorney in accordance with the absolute immunity for prosecutorial judgment, and rejected an abuse-of-process claim against the inspectors. *Moore* v. *Valder*, Civil Action No. 3:91–CV–2491–G (ND Tex., Sept. 21, 1992).[3]

The claims remaining were transferred to the District Court for the District of Columbia, where Moore's suit was dismissed in its entirety, Civ. Nos. 92–2288 (NHJ), 93–0324 (NHJ), 1993 WL 405785 (Sept. 24, 1993), only to have the Court of Appeals for the District of Columbia Circuit reinstate the retaliatory-prosecution claim. *Moore* v. *Valder*, 65 F. 3d 189 (1995). The District Court then permitted limited discovery on that matter so far as the inspectors were involved, but again dismissed the remaining charges against the United States and the prosecutor. *Moore* v. *Valder*, Civil Action No. 92–2288 (NHJ) et al., Record, Tab No. 32 (Memorandum Opinion, Feb. 5, 1998). Although Moore succeeded in having the District of Columbia Circuit reinstate his FTCA claim against the United States, the dismissal of his claims against the prosecutor was affirmed. *Moore* v. *United States*, 213 F. 3d 705 (2000).

With the remainder of the case back in District Court, the inspectors moved for summary judgment, urging that because the underlying criminal charges were supported

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[3]Moore and his wife had originally filed this complaint jointly. Her claims were dismissed for lack of standing.

by probable cause they were entitled to qualified immunity from a retaliatory-prosecution suit. The District Court denied the motion, and the Court of Appeals affirmed. 388 F. 3d 871 (2004).

The Courts of Appeals have divided on the issue of requiring evidence of a lack of probable cause in 42 U. S. C. §1983 and *Bivens* retaliatory-prosecution suits. Some Circuits burden plaintiffs with the obligation to show its absence. See, *e.g.*, *Wood* v. *Kesler*, 323 F. 3d 872, 883 (CA11 2003); *Keenan* v. *Tejeda*, 290 F. 3d 252, 260 (CA5 2002); *Mozzochi* v. *Borden*, 959 F. 2d 1174, 1179–1180 (CA2 1992). Others, including the District of Columbia Circuit, impose no such requirement. See, *e.g.*, *Poole* v. *County of Otero*, 271 F. 3d 955, 961 (CA10 2001); *Haynesworth* v. *Miller*, 820 F. 2d 1245, 1256–1257 (CADC 1987). We granted certiorari, 545 U. S. ___ (2005), to resolve the Circuit split and now reverse.

II

Official reprisal for protected speech "offends the Constitution [because] it threatens to inhibit exercise of the protected right," *Crawford-El* v. *Britton*, 523 U. S. 574, 588, n. 10 (1998), and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out, *id.*, at 592; see also *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972) (noting that the government may not punish a person or deprive him of a benefit on the basis of his "constitutionally protected speech"). Some official actions adverse to such a speaker might well be unexceptionable if taken on other grounds, but when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution. See *Crawford-El*, *supra*, at 593; *Mt. Healthy*

City Bd. of Ed. v. *Doyle*, 429 U. S. 274, 283–284 (1977) (adverse action against government employee cannot be taken if it is in response to the employee's "exercise of constitutionally protected First Amendment freedoms"). When the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*. See 403 U. S., at 397.

III

Despite a procedural history portending another *Jarndyce* v. *Jarndyce*,[4] the issue before us is straightforward: whether a plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges.[5]

A

The inspectors argue on two fronts that absence of

[4] See 2 C. Dickens, Bleak House 85 (1853).

[5] Moore contends that we (like the Court of Appeals before us) exceed our appellate jurisdiction when we address the issue of probable cause, see Brief for Respondent 37–39, but his argument is mistaken. It is true that the disagreement over a no-probable-cause requirement arose on the inspectors' motion for summary judgment on their qualified-immunity defense; Moore stresses that an interlocutory appeal can be taken from the rejection of qualified immunity at the summary-judgment stage only on questions turning on the definition of the violation, not on the sufficiency of the evidence to show that a defendant is in fact entitled to the immunity claimed. See *Mitchell* v. *Forsyth*, 472 U. S. 511, 528 (1985). Moore says that the issue of probable cause or its absence is simply an evidentiary matter going to entitlement in fact. But the inspectors are making more than a claim about the evidence in this case: they are arguing that we should hold that a showing of no probable cause is an element of the kind of claim Moore is making against them. In agreeing with the inspectors, we are addressing a requirement of causation, which Moore must plead and prove in order to win, and our holding does not go beyond a definition of an element of the tort, directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal. See *ibid.*; see also *Crawford-El* v. *Britton*, 523 U. S. 574, 588, 592–593 (1998); *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 285–286 (1977).

probable cause should be an essential element. Without such a requirement, they first say, the *Bivens* claim is too readily available. A plaintiff can afflict a public officer with disruption and expense by alleging nothing more, in practical terms, than action with a retaliatory animus, a subjective condition too easy to claim and too hard to defend against. Brief for Petitioners 21–23; see also *National Archives and Records Admin.* v. *Favish*, 541 U. S. 157, 175 (2004) (allegations of government misconduct are "'easy to allege and hard to disprove'"). In the inspectors' view, some "objective" burden must be imposed on these plaintiffs, simply to filter out the frivolous. The second argument complements the first, for the inspectors believe that the traditional tort of malicious prosecution tells us what the objective requirement should be. Brief for Petitioners 24–29. In an action for malicious prosecution after an acquittal, a plaintiff must show that the criminal action was begun without probable cause for charging the crime in the first place; the inspectors see retaliatory prosecution under *Bivens* as a close cousin of malicious prosecution under common law, making the latter's no-probable-cause requirement a natural feature of the constitutional tort. See *Heck* v. *Humphrey*, 512 U. S. 477, 483–485, and 484, n. 4 (1994).

B

In fact, we think there is a fair argument for what the inspectors call an "objective" fact requirement in this type of case, but the nub of that argument differs from the two they set out, which we will deal with only briefly. As for the invitation to rely on common-law parallels, we certainly are ready to look at the elements of common-law torts when we think about elements of actions for constitutional violations, see *Carey* v. *Piphus*, 435 U. S. 247, 258 (1978), but the common law is best understood here more as a source of inspired examples than of prefabricated

components of *Bivens* torts. See, *e.g.*, *Albright* v. *Oliver*, 510 U. S. 266, 277, n. 1 (1994) (GINSBURG, J., concurring); *Bivens*, *supra*, at 394; cf. *Baker* v. *McCollan*, 443 U. S. 137, 146 (1979). And in this instance we could debate whether the closer common-law analog to retaliatory prosecution is malicious prosecution (with its no-probable-cause element) or abuse of process (without it). Compare *Heck*, 512 U. S., at 483–485, and 484, n. 4 with *id.*, at 493–496 (SOUTER, J., concurring in judgment).

Nor is there much leverage in the fear that without a filter to screen out claims federal prosecutors and federal courts will be unduly put upon by the volume of litigation. The basic concern is fair enough, but the slate is not blank. Over the past 25 years fewer than two dozen damages actions for retaliatory prosecution under *Bivens* or §1983 have come squarely before the Federal Courts of Appeals, and there is no disproportion of those cases in Circuits that do not require showing an absence of probable cause.[6]

C

It is, instead, the need to prove a chain of causation from animus to injury, with details specific to retaliatory-prosecution cases, that provides the strongest justification for the no-probable-cause requirement espoused by the inspectors. Although a *Bivens* (or §1983) plaintiff must show a causal connection between a defendant's retaliatory animus and subsequent injury in any sort of retaliation action, see *Crawford-El*, 523 U. S., at 593; *Mt.*

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[6] In fact, many of the appellate challenges have been brought in the Second, Fifth, and Eleventh Circuits, all of which require plaintiffs to show an absence of probable cause. See, *e.g.*, *Izen* v. *Catalina*, 398 F. 3d 363 (CA5 2005) *(per curiam)*; *Wood* v. *Kesler*, 323 F. 3d 872 (CA11 2003); *Keenan* v. *Tejeda*, 290 F. 3d 252 (CA5 2002); *Singer* v. *Fulton County Sheriff*, 63 F. 3d 110 (CA2 1995); *Post* v. *Fort Lauderdale*, 7 F. 3d 1552 (CA11 1993); *Mozzochi* v. *Borden*, 959 F. 2d 1174 (CA2 1992); *Magnotti* v. *Kuntz*, 918 F. 2d 364 (CA2 1990).

Healthy, 429 U. S., at 285–287, the need to demonstrate causation in the retaliatory-prosecution context presents an additional difficulty that can be understood by comparing the requisite causation in ordinary retaliation claims, where the government agent allegedly harboring the animus is also the individual allegedly taking the adverse action, with causation in a case like this one.

Take the example of a public employee's claim that he was fired for speech criticizing the government. See, *e.g.*, *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 566–567 (1968) (allegation that a school board dismissed a teacher for writing a public letter critical of the board's financial administration). While the employee plaintiff obviously must plead and prove adverse official action in retaliation for making the statements, our discussions of the elements of the constitutional tort do not specify any necessary details about proof of a connection between the retaliatory animus and the discharge, which will depend on the circumstances. Cf. *Crawford-El*, *supra*, at 593 ("[A]t least with certain types of claims, proof of an improper motive is not sufficient to establish a constitutional violation—there must also be evidence of causation"). The cases have simply taken the evidence of the motive and the discharge as sufficient for a circumstantial demonstration that the one caused the other. See, *e.g.*, *Mt. Healthy*, *supra*, at 287; see also *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 270, n. 21 (1977). It is clear, moreover, that the causation is understood to be but-for causation, without which the adverse action would not have been taken; we say that upon a prima facie showing of retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of (such as firing the employee). See *Mt. Healthy*, 429 U. S., at 287. If there is a finding that retaliation was not the

but-for cause of the discharge, the claim fails for lack of causal connection between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official's mind. See *ibid.* It may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway. See *Crawford-El, supra,* at 593; *Mt. Healthy, supra,* at 285–286.

When the claimed retaliation for protected conduct is a criminal charge, however, a constitutional tort action will differ from this standard case in two ways. Like any other plaintiff charging official retaliatory action, the plaintiff in a retaliatory-prosecution claim must prove the elements of retaliatory animus as the cause of injury, and the defendant will have the same opportunity to respond to a prima facie case by showing that the action would have been taken anyway, independently of any retaliatory animus. What is different about a prosecution case, however, is that there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge. Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive. This alone does not mean, of course, that a *Bivens* or §1983 plaintiff should be required to plead and prove no probable cause, but it does mean that litigating probable cause will be highly likely in any retaliatory-prosecution case, owing to its powerful eviden-

tiary significance.[7]

The second respect in which a retaliatory-prosecution case is different also goes to the causation that a *Bivens* plaintiff must prove; the difference is that the requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases, and the need to show this more complex connection supports a requirement that no probable cause be alleged and proven. A *Bivens* (or §1983) action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute, *Imbler* v. *Pachtman*, 424 U. S. 409, 431 (1976).[8] Instead, the defendant will be a non-prosecutor, an official, like an inspector here, who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory

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[7]Indeed, even though the Court of Appeals in this case held that plaintiffs do not have to show an absence of probable cause in order to make retaliatory-prosecution claims, it nevertheless acknowledged probable cause's significance in such suits. See 388 F. 3d 871, 881 (CADC 2004) ("Given that probable cause ordinarily suffices to initiate a prosecution, that showing will be enough in most cases to establish that prosecution would have occurred absent bad intent. A *Bivens* recovery remains possible, however, in those rare cases where strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus").

[8]An action could still be brought against a prosecutor for conduct taken in an investigatory capacity, to which absolute immunity does not extend. See *Buckley* v. *Fitzsimmons*, 509 U. S. 259, 274–276 (1993) (no absolute immunity when prosecutor acts in administrative capacity); *Burns* v. *Reed*, 500 U. S. 478, 492–495 (1991) (absolute immunity does not attach when a prosecutor offers legal advice to the police regarding interrogation practices). In fact, Moore's complaint charged the prosecutor with acting in an investigative as well as in a prosecutorial capacity, see App. 45, but dismissal of the complaint as against the prosecutor was affirmed in 213 F. 3d 705, 710 (CADC 2000), and no claim against him is before us now.

inducement to prosecute.[9] The consequence is that a plaintiff like Moore must show that the nonprosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging.

Thus, the causal connection required here is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another. See 213 F. 3d, at 710 ("In order to find that a defendant procured a prosecution, the plaintiff must establish 'a chain of causation' linking the defendant's actions with the initiation of criminal proceedings"); see also *Barts* v. *Joyner*, 865 F. 2d 1187, 1195 (CA11 1989) (plaintiff seeking damages incident to her criminal prosecution would have to show that the police, who allegedly acted in violation of law in securing her arrest, unduly pressured or deceived prosecutors); *Dellums* v. *Powell*, 566 F. 2d 167, 192–193 (CADC 1977) (where allegation of misconduct is directed at police, a malicious-prosecution claim cannot stand if the decision made by the prosecutor to bring criminal charges was independent of any pressure exerted by police); cf. *Smiddy* v. *Varney*, 665 F. 2d 261, 267 (CA9 1981) ("[W]here police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted").

Herein lies the distinct problem of causation in cases like this one. Evidence of an inspector's animus does not

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[9] No one here claims that simply conducting a retaliatory investigation with a view to promote a prosecution is a constitutional tort. That is not part of Moore's complaint. See App. 33–34, 38–45. Whether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation is not before us.

necessarily show that the inspector induced the action of a prosecutor who would not have pressed charges otherwise. Moreover, to the factual difficulty of divining the influence of an investigator or other law enforcement officer upon the prosecutor's mind, there is an added legal obstacle in the longstanding presumption of regularity accorded to prosecutorial decisionmaking. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 489–490 (1999); *United States* v. *Armstrong*, 517 U. S. 456, 464–466 (1996). And this presumption that a prosecutor has legitimate grounds for the action he takes is one we do not lightly discard, given our position that judicial intrusion into executive discretion of such high order should be minimal, see *Wayte* v. *United States*, 470 U. S. 598, 607–608 (1985).

Some sort of allegation, then, is needed both to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity. And at the trial stage, some evidence must link the allegedly retaliatory official to a prosecutor whose action has injured the plaintiff. The connection, to be alleged and shown, is the absence of probable cause.

It would be open to us, of course, to give no special prominence to an absence of probable cause in bridging the causal gap, and to address this distinct causation concern at a merely general level, leaving it to such pleading and proof as the circumstances allow. A prosecutor's disclosure of retaliatory thinking on his part, for example, would be of great significance in addressing the presumption and closing the gap. So would evidence that a prosecutor was nothing but a rubber stamp for his investigative staff or the police. Cf. *Mt. Healthy*, 429 U. S., at 281–283. (evidence that the board of education, which formally decided not to rehire a teacher, was only nominally distinct from the school superintendent, who allegedly bore the retaliatory animus). In fact, though, these examples

are likely to be rare and consequently poor guides in structuring a cause of action. In most cases, for instance, it would be unrealistic to expect a prosecutor to reveal his mind even to the degree that this record discloses, with its reported statement by the prosecutor that he was not galvanized by the merits of the case, but sought the indictment against Moore because he wanted to attract the interest of a law firm looking for a tough trial lawyer.[10]

Accordingly, the significance of probable cause or the lack of it looms large, being a potential feature of every case, with obvious evidentiary value. True, it is not necessarily dispositive: showing an absence of probable cause may not be conclusive that the inducement succeeded, and showing its presence does not guarantee that inducement was not the but-for fact in a prosecutor's decision. But a retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause supporting the prosecutor's decision to go forward are reasonable grounds to suspend the presumption of regularity behind the charging decision, see *Bordenkircher* v. *Hayes*, 434 U. S. 357, 364 (1978) (emphasizing that "so long as the prosecutor has probable cause," the charging decision is

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[10] Some may suggest that we should structure a cause of action in the alternative, dispensing with a requirement to show no probable cause when a plaintiff has evidence of a direct admission by a prosecutor that, irrespective of probable cause, the prosecutor's sole purpose in initiating a criminal prosecution was to acquiesce to the inducements of other government agents, who themselves harbored retaliatory animus. Cf. *United States* v. *Armstrong*, 517 U. S. 456, 469, n. 3 (1996) (leaving open the question "whether a [criminal] defendant must satisfy the similarly situated requirement in a case 'involving direct admissions by [prosecutors] of discriminatory purpose'" (brackets in original)). But this would seem a little like proposing that retirement plans include the possibility of winning the lottery. Unambiguous admissions of successful inducement are likely to be rare, and hassles over the adequacy of admissions will be the predictable result, if any exemption to a no-probable-cause requirement is allowed.

generally discretionary), and enough for a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the charge.

Our sense is that the very significance of probable cause means that a requirement to plead and prove its absence will usually be cost free by any incremental reckoning. The issue is so likely to be raised by some party at some point that treating it as important enough to be an element will be a way to address the issue of causation without adding to time or expense. See n. 7, *supra*. In this case, for example, Moore cannot succeed in the retaliation claim without showing that the Assistant United States Attorney was worse than just an unabashed careerist, and if he can show that the prosecutor had no probable cause, the claim of retaliation will have some vitality.

In sum, the complexity of causation in a claim that prosecution was induced by an official bent on retaliation should be addressed specifically in defining the elements of the tort. Probable cause or its absence will be at least an evidentiary issue in practically all such cases. Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE and JUSTICE ALITO took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 04–1495

MICHAEL HARTMAN, FRANK KORMANN, PIERCE McINTOSH, NORMAN ROBBINS, AND ROBERT EDWARDS, PETITIONERS *v.* WILLIAM G. MOORE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April 26, 2006]

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

The Court of Appeals, reviewing the record so far made, determined that "[t]he evidence of retaliatory motive [came] close to the proverbial smoking gun." 388 F. 3d 871, 884 (CADC 2004). The record also indicated that the postal inspectors engaged in "unusual prodding," strenuously urging a reluctant U. S. Attorney's Office to press charges against Moore. *Ibid.* Following Circuit precedent, the Court of Appeals held that "once a plaintiff shows [conduct sheltered by the First Amendment] to have been a motivating factor in the decision to press charges," the burden shifts to the defending officials to show that the case would have been pursued anyway. *Id.*, at 878.

Recognizing that this case is now directed against the instigating postal inspectors alone, not the prosecutor, I would not assign to the plaintiff the burden of pleading and proving the absence of probable cause for the prosecution. Instead, in agreement with the Court of Appeals, I would assign to the postal inspectors who urged the prosecution the burden of showing that, had there been no retaliatory motive and importuning, the U. S. Attorney's Office nonetheless would have pursued the case.

Under the Court's proof burden allocation, which saddles plaintiff—the alleged victim—with the burden to plead and prove lack of probable cause, only *entirely* "baseless prosecutions" would be checked. *Id.*, at 879. So long as the retaliators present evidence barely sufficient to establish probable cause and persuade a prosecutor to act on their thin information, they could accomplish their mission cost free. Their victim, on the other hand, would incur not only the costs entailed in mounting a defense, he likely would sustain a reputational loss as well, and neither loss would be compensable under federal law. Under the D. C. Circuit's more speech-protective formulation, "[a] *Bivens* [v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971),] recovery remains possible . . . in those rare cases where strong motive evidence combines with weak probable cause to support a finding that the [investigation and ensuing] prosecution would not have occurred but for the [defending] officials' retaliatory animus." *Id.*, at 881. That such situations "are likely to be rare," it seems to me, does not warrant "structuring a cause of action," *ante*, at 14, that precludes relief when they do arise.

For reasons fully developed in the D. C. Circuit's opinion, I conclude that, in full accord with this Court's decision in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977), the Court of Appeals' decision strikes the proper balance. I would, therefore, affirm the Circuit's judgment.